Docket for 03-5165

(10)

No. 03-5165 Status: ARGUED
Title: Marcus Thornton, Petitioner
v.
United States
Docketed: July 3, 2003
Lower Ct: United States Court of Appeals for the Fourth Circuit
Case Nos.: (02-4382)
Decision Date: April 3, 2003
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Jul 1 2003	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due August 4, 2003)
Jul 31 2003	Order extending time to file response to petition to and including September 3, 2003.
Sep 3 2003	Brief of respondent United States in opposition filed.
Sep 18 2003	DISTRIBUTED for Conference of October 10, 2003.
Oct 27 2003	DISTRIBUTED for Conference of October 31, 2003.
Nov 3 2003	Motion to proceed in forma pauperis and petition for a wit of certiorari GRANTED.
Nov 28 2003	Joint appendix filed.
Dec 16 2003	Motion for leave to file amicus brief filed by Shashank S. Upadhye.
Dec 18 2003	Brief of petitioner Marcus Thornton filed.
Dec 18 2003	Brief amici curiae of American Civil Liberties Union, et al. filed.
Jan 12 2004	Motion for leave to file amicus brief filed by Shashank S. Upadhye GRANTED.
Jan 12 2004	SET FOR ARGUMENT Wednesday, March 31, 2004.
Jan 21 2004	CIRCULATED.
Jan 22 2004	Brief of respondent United States filed.(Distributed.)
Jan 23 2004	Brief amici curiae of Arizona, et al. filed. (Distributed)
Feb 2 2004	Record received from the U.S.C.A. for the 4th Circuit. (1 envelope)
Feb 5 2004	Record received from the U.S.D.C. for the Eastern District of Virginia (A portion of the record is sealed)
Feb 6 2004	Application (03A674) to extend the time to file a reply brief on the merits from February 26, 2004 to March 4, 2004, submitted to The Chief Justice.
Feb 10 2004	Application (03A674) denied by The Chief Justice.
Feb 26 2004	Reply of petitioner Marcus Thornton filed.
Mar 31 2004	Argued. For petitioner: Frank W. Dunham, Jr., Federal Public Defender for the Eastern District of Virginia, Alexandria, Va. For respondent: Gregory G. Garre, Assistant to the Solicitor General, Department of Justice, Washington, D.C.

(7)

No. 02-03 5165

IN THE

SUPREME COURT OF THE UNITED STATES

MARCUS THORNTON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

FILED
JUL 1 2003

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the bright-line rule announced in *New York v. Belton* is confined to situations in which the police initiate contact with the occupant of a vehicle while that person is in the vehicle?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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No. 02-_____

IN THE SUPREME COURT OF THE UNITED STATES

MARCUS THORNTON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit appears at Appendix A to the petition and is reported at 325 F.3d 189 (4th Cir. 2003). The ruling of the district court appears at Appendix B to the petition and is unpublished.

JURISDICTION

The United States District Court for the Eastern District of Virginia had jurisdiction over this criminal case pursuant to 18 U.S.C. § 3231. The United States Court of Appeals for the Fourth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291. That court decided this case on April 3, 2003. Petitioner did not seek rehearing. Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fourth Amendment to the United States Constitution, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On July 21, 2001, Norfolk (Virginia) Police Officer Deion L. Nichols, on patrol in an unmarked car, followed Petitioner's car into a parking lot after the officer discovered that the license plates on Petitioner's car did not match the car to which they were issued. The officer had run a tag check because he wrongly assumed that Petitioner was the driver of a vehicle that would not pull all the way up to the officer's car as they drove on the street a short time earlier. Petitioner parked his car,

got out, and began to walk away. The officer also parked his car, got out, and approached Petitioner. The officer, who was in uniform, asked Petitioner for his license and told him that his car did not match the vehicle to which the license plates were assigned. (App. A at 1-2; App. B at 1-2.)

According to the officer, Petitioner, who appeared nervous, licking his lips and sweating, said that someone had just given him the car. (App. A at 2.) For officer safety, the officer asked Petitioner if he had any drugs or guns on him or in the car. Petitioner responded "no." Again for officer safety, the officer patted down Petitioner after asking permission. Feeling a bulge in Petitioner's front left pocket, the officer again asked if Petitioner had any drugs on him. Petitioner said he had a bag of "weed," which he gave to the officer along with a bag of what appeared to be crack cocaine. (App. A at 2; App. B at 2.) The officer handcuffed Petitioner and immediately placed him in the back of the patrol car. (App. B at 3.) The officer then went to Petitioner's car to conduct a search. He found a nine-millimeter handgun under the driver's seat. (App. A at 2; App. B at 3.) On the basis of this conduct, Petitioner was charged with possession with intent to distribute cocaine base (21 U.S.C. § 841(a)(1)), possession of a firearm by a convicted felon (18 U.S.C. § 922(g)(1)), and possession of a firearm in furtherance of a drug trafficking crime (18 U.S.C. § 924(c)). (App. A at 2.)

Petitioner moved to suppress the evidence against him, including the drugs and the firearm. The district court denied the motion, finding in pertinent part that the officer lawfully searched Petitioner's car incident to his arrest and, alternatively, that the officer could have conducted an inventory search of the car. (App. B.) Petitioner was convicted by a jury of all three charges. He moved for a new trial on the ground that the car search was illegal; the district court denied the motion. The court sentenced Petitioner to 180 months of imprisonment and eight years of supervised release. (App. A at 2.)

Petitioner appealed to the U.S. Court of Appeals for the Fourth Circuit, challenging only the district court's refusal to suppress the firearm. In a published opinion, that court affirmed the district court. After reviewing the division among the federal appellate and state courts as to the application of *New York v. Belton*, 453 U.S. 454 (1981),[1] to cases involving facts similar to Petitioner's, and acknowledging this

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[1] The split among the federal appellate courts has deepened. Six circuits have now ruled on this issue, three on each side. *Compare United States v. Green*, 324 F.3d 375, 378-79 (5th Cir. 2003) (declining to apply *Belton* where defendant had exited vehicle and was about 25 feet away from it when first approached by officers), *petition for cert. filed* (U.S. June 6, 2003) (No. 02-1811); *United States v. Strahan*, 984 F.2d 155, 159 (6th Cir. 1993) (declining to apply *Belton* where officer first made contact with defendant after he had exited his vehicle and was about 30 feet away from it), *and United States v. Fafowora*, 865 F.3d 360, 362 (D.C. Cir. 1989) (declining to apply *Belton* where defendant had parked vehicle and had walked approximately one car length away when arrested) *with United States v. Thornton*, 325 F.3d 189, 193-96 (4th Cir. 2003); *United States v. Sholola*, 124 F.3d 803, 817 (continued...)

Court's decision in *Florida v. Thomas*, 532 U.S. 774 (2001), the Fourth Circuit expanded application of the *Belton* rule to cases in which the police initiate contact with a suspect while that person is outside of a vehicle. (App. A at 4-6.)

REASONS FOR GRANTING THE PETITION

This case presents the same issue as two other cases in which this Court has granted certiorari. In *Florida v. Thomas*, 532 U.S. 774 (2001), the Court granted certiorari "to consider whether [the rule of *New York v. Belton*] is limited to situations in which the officer initiates contact with the occupant of a vehicle while that person remains inside the vehicle." *Id.* at 776. The Court, however, dismissed the case for lack of jurisdiction. Recently, this Court granted certiorari in *Arizona v. Gant*, 43 P.3d 188 (Ariz. App. 2002), *cert. granted*, 123 S. Ct. 1784 (U.S. April 21, 2003) (No. 02-1019). That case presents the question of whether, when police arrest a recent occupant of a vehicle outside the vehicle, they are precluded from searching the vehicle pursuant to *New York v. Belton* unless the arrestee was actually or constructively aware of the police before getting out of the vehicle. Thus, this Court

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[1] (...continued)
(7th Cir. 1997) (applying *Belton* where defendant's words and conduct linked him to vehicle and conveyed that it was his, or at least under his dominion and control, despite fact that defendant "was not technically an 'occupant' of the vehicle immediately prior to the search"), *and United States v. Franco*, 981 F.2d 470, 472-73 (10th Cir. 1992) (applying *Belton* where defendant was arrested in undercover agent's car near his automobile based on fact that he accessed his automobile during transaction, which established that he was in control of automobile at time of arrest).

has already determined that the question presented by Petitioner's case is of great importance. For the same reasons that the Court granted certiorari in *Thomas* and in *Gant*, Petitioner requests that the Court grant certiorari in his case.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the petition should be held pending this Court's decision in *Arizona v. Gant*.

Respectfully submitted this 1st day of July, 2003.

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APPENDIX A

LEXSEE 325 f3d 189

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MARCUS THORNTON, Defendant-Appellant.

No. 02-4382

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

325 F.3d 189; 2003 U.S. App. LEXIS 6367

February 24, 2003, Argued

April 3, 2003, Decided

PRIOR HISTORY:
[1]** Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Rebecca Beach Smith, District Judge. (CR-01-235).

DISPOSITION:
Affirmed.

COUNSEL:
ARGUED: Walter Bruce Dalton, Assistant Federal Public Defender, Norfolk, Virginia, for Appellant.

Laura Marie Everhart, Assistant United States Attorney, Norfolk, Virginia, for Appellee.

ON BRIEF: Frank W. Dunham, Jr., Federal Public Defender, Norfolk, Virginia, for Appellant.

Paul J. McNulty, United States Attorney, Norfolk, Virginia, for Appellee.

JUDGES:
Before WIDENER, WILLIAMS, and MOTZ, Circuit Judges. Judge Motz wrote the opinion, in which Judge Widener and Judge Williams joined.

OPINIONBY:
DIANA GRIBBON MOTZ

OPINION:

[*190] DIANA GRIBBON MOTZ, Circuit Judge:

A jury convicted Marcus Thornton of possession with intent to distribute cocaine base and two firearm offenses. On appeal, he challenges only the district court's refusal to suppress a firearm found in his automobile, maintaining that it was not legally obtained pursuant to a "search incident to arrest." For the reasons that follow, we affirm.

I.

At a pretrial suppression hearing, the parties produced the following evidence.

On July 21, 2001, Officer Deion L. **[**2]** Nichols, of the Norfolk, Virginia Police Department, driving in an unmarked police cruiser, observed a gold Lincoln Town Car pull to his left that "wouldn't come all the way up to [him]." Assuming that the driver of the Lincoln suspected that he was a police officer, Officer Nichols pulled over to a side street and made a right turn. After the Lincoln passed him, Officer Nichols ran a check on the tags. The check revealed that the tags had been issued to a 1982 Chevy two-door car rather than a Lincoln Town Car. Officer Nichols followed the Lincoln, intending to pull it over. The Lincoln was driven into a parking lot, however, before Officer Nichols "had a chance to do so." Thornton parked the Lincoln and exited the vehicle. Officer Nichols "pulled in behind him and exited [his] vehicle." Officer Nichols, who was in **[*191]** uniform, then approached Thornton, asked him for his driver's license, and told him that his tags did not match the registered vehicle.

Thornton "appeared nervous" and "right away started rambling," "licking his lips," and "sweating." He told Officer Nichols that "someone had just given him the car." "For officer safety," Officer Nichols asked Thornton if he had any **[**3]** narcotics or weapons on him. Thornton said no. The officer then asked him if there were any weapons or narcotics in the car. Thornton again said no. Officer Nichols, "again for officer safety," patted Thornton down, after asking if he could do so. Officer Nichols felt a "bulge" in Thornton's front left pocket. The officer "didn't know what it was, so [he] just

kind of casually asked Thornton, 'Do you have any illegal narcotics on you?'" Thornton said that he had "a bag of weed." Officer Nichols then asked him if he could have the bag. Thornton "reached into his pocket" and "pulled out two individual bags," one containing three bags of a "green leafy material consistent with marijuana" and the other with a "large amount of an off-white rocklike substance consistent with crack cocaine."

At that point, Officer Nichols handcuffed Thornton and advised him that he was under arrest. (At trial, Officer Nichols testified that he immediately thereafter put Thornton in the back of the patrol car.) Then, "incident to that arrest," the officer searched the vehicle and found a "BryCo .9-millimeter handgun" under the front driver's seat, where he had observed Thornton sitting. On the way to the **[**4]** police station, Thornton told Officer Nichols, "without any provocation," that he had "just robbed some cat out at Ocean View, and that's where he got the dope."

On December 12, 2001, a grand jury charged Thornton with possession with intent to distribute cocaine base, in violation of *21 U.S.C.A. § 841(a)(1) (West 1999)*, possession of a firearm after having been previously convicted of a crime punishable by a term of imprisonment exceeding one year, in violation of *18 U.S.C.A. § 922(g)(1) (West 2000)*, and possession of a firearm in furtherance of a drug trafficking crime, in violation of *18 U.S.C.A. § 924(c)(1) (West 2000)*.

Thornton moved to suppress the drugs, his statement, and the firearm on various grounds. After a hearing, the district court denied the motion, finding, *inter alia*, that Officer Nichols lawfully searched Thornton's automobile incident to his arrest and, alternatively, that Officer Nichols could have conducted an inventory search of the automobile.

On February 8, 2002, a jury convicted Thornton on all three counts. Thornton moved for a new trial, again arguing that the automobile search was **[**5]** unlawful. The district court denied the motion based on the earlier suppression ruling. On May 3, 2002, the district court sentenced Thornton to 180 months imprisonment and eight years of supervised release. Thornton appeals, challenging only the district court's refusal to suppress the firearm; he does not challenge the refusal to suppress the drugs or his statement.

II.

In reviewing the district court's denial of a motion to suppress evidence, we review legal conclusions *de novo* and factual findings for clear error. *See United States v. Weaver, 282 F.3d 302, 309 (4th Cir. 2002)*.

Thornton's sole contention on appeal is that the search incident to arrest doctrine, as applied to searches of automobiles in *New York v. Belton, 453 U.S. 454, 69 L. Ed. 2d 768, 101 S. Ct. 2860 (1981)*, required Officer Nichols to "initiate ... contact with **[*192]** Thornton, either by actually confronting Thornton, or signaling confrontation with Thornton, while Thornton was still in his vehicle."

A.

It is a well-settled "first principle of *Fourth Amendment* jurisprudence that the police may not conduct a search unless they first convince a neutral magistrate that there **[**6]** is probable cause to do so." *Belton, 453 U.S. at 457*. In *Chimel v. California, 395 U.S. 752, 23 L. Ed. 2d 685, 89 S. Ct. 2034 (1969)*, the Court discussed the rationale for and limitations of the "search incident to arrest" exception to that warrant requirement:

> When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area "within his immediate **[**7]** control" -- construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.

Chimel, 395 U.S. at 762-63. The Court has often reiterated the "two historical rationales for the 'search incident to arrest' exception: (1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial." *Knowles v. Iowa, 525 U.S. 113, 116, 142 L. Ed. 2d 492, 119 S. Ct. 484 (1998)* (citing, *inter alia*, *United States v. Robinson, 414 U.S. 218, 234, 38 L. Ed. 2d 427, 94 S. Ct. 467 (1973)*; *Chimel, 395 U.S. at 762-63*).

The Court in *Belton* applied those rationales to the arrest of an "occupant" of an automobile. *See Belton, 453 U.S. at 460*. In *Belton*, a police officer stopped four men, who had sped past the officer. *Id. at 455*. The officer "gave chase, overtook the speeding vehicle, and ordered its driver to pull it over to the side of the road and stop." *Id.* After examining the driver's license and the vehicle registration, the officer determined that none of the men **[**8]** owned the vehicle. *Id.* During that time, the officer also smelled burnt marijuana and saw, on the floor of the car, an envelope marked "Supergold," which he associated with marijuana. *Id. at 455-56*. Accordingly, the officer directed the men to get out of the car and arrested them for unlawful possession of marijuana. *Id. at 456*. After they exited the vehicle, the officer patted down each of them and "'split them into four separate areas of the Thruway ... so they would not be in physical touching area of each other.'" *Id.* The officer then searched the passenger compartment; he found Belton's jacket on the back seat, unzipped one of the pockets of the jacket, and found cocaine. *Id.*

The Supreme Court rejected Belton's argument that the search of the passenger compartment of the car exceeded the permissible scope of the search incident to his arrest. The Court began its analysis by observing that for the protection of the **[*193]** *Fourth* and *Fourteenth Amendments* to be realized, courts must fashion a clear set of rules that allow police officers to easily determine in most situations "whether an invasion of privacy is justified in the interest of **[**9]** law enforcement." *Id. at 458* (internal quotation marks omitted). Thus, the Court reasoned, "[a] single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Id.* (internal quotation marks omitted).

The Court then noted the difficulty courts had experienced in fashioning such a rule in the context of an automobile search incident to an arrest:

> While the *Chimel* case established that a search incident to an arrest may not stray beyond the area within the immediate control of the arrestee, courts have found no workable definition of "the area within the immediate control of the arrestee" when that area arguably includes the interior of an automobile and the arrestee is its recent occupant.

Id. at 460. Because articles within a car's passenger compartment "are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary item,'" the *Belton* Court established the "workable rule" that "when a **[**10]** policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Id. at 460* (quoting *Chimel, 395 U.S. at 763*) (footnotes omitted). n1

> n1 Although using "occupant " in stating its holding, the *Belton* Court also, as noted above, referred to a "recent occupant." *See id. at 460*; *id. at 463* (Brennan, J., dissenting); *see also United States v. Franco, 981 F.2d 470, 473 (10th Cir. 1992)* (citing *Belton* for the proposition that "incident to an arrest, police officers may search a vehicle of which the arrestee was a recent occupant").

B.

Thornton contends that the *Belton* rule does not govern this case because he was not an "occupant of an automobile" when Officer Nichols confronted him. In support of this contention, Thornton relies primarily on a line of authority from the United States Court of Appeals for the Sixth Circuit. **[**11]** *See, e.g., United States v. Hudgins, 52 F.3d 115, 119 (6th Cir. 1995)*; *United States v. Strahan, 984 F.2d 155, 159 (6th Cir. 1993)*. In *Hudgins*, the court elaborated on the principle that Thornton urges us to adopt:

> Where the officer initiates contact with the defendant, either by actually confronting the defendant or by signaling confrontation with the defendant, while the defendant is still in the automobile, and the officer subsequently arrests the defendant (regardless of whether the defendant has been removed from or has exited the automobile), a subsequent search of the automobile's passenger compartment falls within the scope of *Belton* and will be upheld as reasonable.
>
> ..... However, *where the defendant has voluntarily exited the automobile and begun walking away from the automobile before the officer has initiated contact with him, the case does not fit within Belton's bright-line rule*, and a case by-case analysis of the reasonableness of the search under *Chimel* becomes necessary.

52 F.3d at 119 (emphasis added). *See also Strahan, 984 F.2d at 15657, 159* (following this **[**12]** rule and finding that *Belton* did not **[*194]** apply because police *silently* observed the defendant park and exit his automobile and then immediately apprehended him approximately 30 feet away).

This court has not previously addressed the Sixth Circuit's limitation on the *Belton* rule in a published opinion. We note, however, that other courts of appeals have considered the question. Although one court previously embraced a rule consistent with the Sixth Circuit's limitation, *see United States v. Fafowora, 275 U.S. App. D.C. 141, 865 F.2d 360, 362 (D.C. Cir. 1989)* (holding that "ambiguity" necessitating *Belton*'s bright-line rule does not apply "where the police come upon the arrestees outside of an automobile"), three others have refused to do so. *See United States v. Sholola, 124 F.3d 803, 817 (7th Cir. 1997)* (holding that defendant who was next to open car door ready to enter it, was "'positively linked to [car] prior to his arrest'") (quoting

United States v. Adams, 26 F.3d 702, 705 (7th Cir. 1994); *United States v. Snook, 88 F.3d 605, 606 (8th Cir. 1996)* (holding that fact that defendant "had just stepped **[**13]** out of his vehicle as the officer arrived and before his arrest does not alter his status as an 'occupant' of the vehicle"); *United States v. Franco, 981 F.2d 470, 473 (10th Cir. 1992)* (declining to adopt rule, advanced by defendant, that "unless an arrest was made in the arrestee's automobile, a search of the automobile was not 'incident to the arrest' for the purpose of that exception to the warrant requirement").

State courts have also struggled with this issue. *Compare, e.g., State v. Stehman, 203 Ill. 2d 26, 783 N.E.2d 1, 6 (Ill. 2002)* ("We find the ... analysis of the Sixth Circuit Court of Appeals in [*Hudgins*] persuasive."), *with State v. Wanzek, 1999 ND 163, 598 N.W.2d 811, 815 (N.D. 1999)* ("We are not persuaded by the line of cases which hold an arrestee is an occupant only when arrested inside the vehicle or where the police initiate contact with the arrestee before the arrestee exits the vehicle."); *Glasco v. Commonwealth, 257 Va. 433, 513 S.E.2d 137, 141-42 (Va. 1999)* (same).

Given this division, it is not surprising that the Supreme Court recently granted certiorari on the question of whether **[**14]** *Belton*'s "bright-line" rule "is limited to situations in which the officer initiates contact with the occupant of a vehicle while that person remains inside the vehicle." *Florida v. Thomas, 532 U.S. 774, 776, 150 L. Ed. 2d 1, 121 S. Ct. 1905 (2001)*. In *Thomas*, Florida's highest court expressly adopted the Sixth Circuit's approach. *See Thomas v. State, 761 So. 2d 1010, 1013 (Fla. 1999)* ("We find the recent analysis of the Sixth Circuit Court of Appeals in [*Hudgins*] persuasive."). After full briefing and oral argument, however, the Supreme Court dismissed the case for want of jurisdiction. *See Thomas, 532 U.S. at 781*.

After carefully considering the question and the conflicting authority, we join those courts that have rejected the limitation of *Belton* to situations in which "the officer initiates contact with the defendant, either by actually confronting the defendant or by signaling confrontation with the defendant, while the defendant is still in the automobile." *Hudgins, 52 F.3d at 119*. We do so for a number of reasons.

First, the Supreme Court has clearly indicated, albeit in dicta, that an officer **[**15]** may search an automobile incident to an arrest, even if the officer has not initiated contact while the arrestee was still in the automobile. In *Michigan v. Long, 463 U.S. 1032, 77 L. Ed. 2d 1201, 103 S. Ct. 3469 (1983)*, officers on patrol in a rural area observed a speeding car turn down a road and swerve into a shallow ditch. *Id. at 1035*. When the officers **[*195]** arrived at the scene, they met Long, the sole occupant of the vehicle, "at the rear of the car, which was protruding from the ditch onto the road," with the driver's side door open. *Id. at 1035-36*. Although affirming a subsequent search of the car's passenger compartment as a protective one under *Terry v. Ohio, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968)*, the Court noted at the outset that "it is clear, and the respondent concedes, that if the officers had arrested Long ... they could have searched the passenger compartment [under *Belton*]." *Id. at 1035 n.1*. The Court further explained:

> We stress that our decision does not mean that the police may conduct automobile searches *whenever* they conduct an investigative stop, although the **[**16]** "bright line" that we drew in *Belton* clearly authorizes such a search whenever officers effect a custodial arrest. An additional interest exists in the arrest context, *i.e.*, preservation of evidence, and this justifies an "automatic" search.

Id. at 1049 n.14 (emphasis in original); *see also Thomas, 532 U.S. at 776* (emphasizing the "bright-line" nature of the *Belton* rule).

Further, the historical rationales for the search incident to arrest doctrine -- "the need to disarm the suspect in order to take him into custody" and "the need to preserve evidence for later use at trial" -do not permit the limitation on the *Belton* rule that the Sixth Circuit has adopted and Thornton espouses. *Knowles, 525 U.S. at 116*. "'Danger to an officer'" from an arrest and the "need to discover and preserve evidence" continue to be concerns regardless of whether the arrestee exits the automobile voluntarily or because of confrontation with an officer. *Id. at 117-18* (quoting *Robinson, 414 U.S. at 234-35*). Neither the Sixth Circuit nor Thornton suggest otherwise.

Indeed, we believe that Thornton's proposed limitation **[**17]** of the *Belton* rule would raise serious safety concerns for law enforcement personnel. A rule that requires officers to actually confront or signal confrontation with an arrestee while the arrestee is in the automobile, in order to justify a search of the automobile incident to arrest, could very well endanger an officer. For instance, we can certainly imagine the hesitancy of an officer to activate his lights and sirens if the officer encounters the arrestee while conducting undercover surveillance in an area. Moreover, when encountering a dangerous suspect, it may often be much safer for officers to wait until the suspect has exited a vehicle before signaling their presence, thereby depriving the suspect of any weapons he may have in his vehicle, the protective cover of the vehicle, and the possibility of using the vehicle itself as either a weapon or a means of flight. Mandating that officers alert a suspect to their presence before he sheds the protective confines of his vehicle would force officers to choose between forfeiting the opportunity to preserve evidence for later use at trial and increasing the risk to their own lives and the lives of

others. We decline to require **[**18]** officers to make this choice. *See Wanzek, 598 N.W.2d at 815* (The cases adopting the proposed limitation "raise grave public policy issues because they create serious concerns for the safety of officers and others."); *Thomas, 761 So. 2d at 1014-15* (Wells, J., dissenting) ("The reason for this bright-line rule is officer safety, which is equally as much a concern whether the officer initiates the contact, actually confronts the person, or the person voluntarily exits the vehicle as long as the connection with the vehicle is proximate to the arrest."); *Stehman, 783 N.E.2d at 11* (Thomas, J., dissenting) **[*196]** ("Whether the defendant exits voluntarily or involuntarily, there is always a danger to the officer associated with the subsequent arrest and the proximity of the vehicle.").

Additionally, the limitation on the *Belton* rule that Thornton urges could "encourage individuals to avoid lawful searches of their vehicles by rapidly exiting or moving away from the vehicle as officers approached." *Wanzek, 598 N.W.2d at 815*. Surely, "police officers should not have to race from their vehicles to the arrestee's vehicle to prevent **[**19]** the arrestee from getting out of the vehicle in order to conduct a valid search." *Id.*

Nonetheless, we recognize the concerns of those courts that have attempted to limit the scope of *Belton* to situations in which officers have initiated contact with arrestees while still in the automobile. The *Belton* rule cannot be stretched so as to render it limitless by permitting officers to search any vehicle from which an arrestee has emerged, regardless of how much time has elapsed since his exit or how far he is from the vehicle when arrested.

In the case at hand, however, we note that Thornton concedes that he was in close proximity to his vehicle when Officer Nichols approached him. His concession is well-taken. Although the record is not clear as to the precise distance between Thornton and his automobile when Officer Nichols confronted him, the record does conclusively show that Officer Nichols observed Thornton park and exit his automobile and then approached Thornton *within moments*.

Thus, "no doubt exists that the car was within [Thornton's] immediate control at the beginning of his encounter with" Officer Nichols. *See United States v. Johnson, 114 F.3d 435, 440 (4th Cir. 1997)* **[**20]** (so noting in case involving question of unreasonable delay between arrest and search of car). Stated differently, Thornton "was 'positively linked' to the searched vehicle prior to his arrest." *Sholola, 124 F.3d at 817* (quoting *Adams, 26 F.3d at 705*); *id. at 823* (Wood, J., concurring) ("The 'positive link' required must, in keeping with *Belton*, be one that requires physical proximity that is the equivalent of occupancy of the automobile."); *see also Franco, 981 F.2d at 473* (affirming validity of search under *Belton* because defendant "was a recent occupant of his vehicle[,]" "the arrest was made in close proximity to his vehicle[,]" and "during the illegal transaction [defendant] exercised control over his vehicle and its contents"). The conceded close proximity, both temporally and spatially, of Thornton and his car at the time of his arrest provides adequate assurance that application of the *Belton* rule to cases like this one does not render that rule limitless. n2 Accordingly, we hold that Officer Nichols lawfully searched Thornton's automobile incident to the arrest. Because we affirm on this ground, we decline **[**21]** to reach the district court's alternative holding that Officer Nichols could have conducted a lawful inventory search.

n2 We also note that circuit precedent, which Thornton does not challenge, permitted Officer Nichols to separate Thornton from the vehicle (in this case by handcuffing him and placing him in the patrol car) prior to the search. *See United States v. Milton, 52 F.3d 78, 80 (4th Cir. 1995)* (holding that *Belton* "applies even if the arrestee has been separated from [the vehicle] prior to the search of the passenger compartment" (internal quotation marks omitted)); *see also* 3 Wayne R. LaFave, *Search & Seizure* § 7.1(c), at 448-49 (3d ed. 1996 & Supp. 2003) ("Under *Belton* a search of the vehicle is allowed even after the defendant was removed from it, handcuffed, and placed in the squad car, or even if a single defendant was in the custody of several officers.") (footnotes omitted)).

[*197] III.

For the foregoing reasons, the judgment of the district court is

AFFIRMED **[**22]** .

APPENDIX B

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MARCUS THORNTON,
Defendant-Appellant.

No. 02-4382

Appeal from the United States District Court
for the Eastern District of Virginia, at Norfolk.
Rebecca Beach Smith, District Judge.
(CR-01-235)

Argued: February 24, 2003

Decided: April 3, 2003

Before WIDENER, WILLIAMS, and MOTZ, Circuit Judges.

Affirmed by published opinion. Judge Motz wrote the opinion, in which Judge Widener and Judge Williams joined.

COUNSEL

ARGUED: Walter Bruce Dalton, Assistant Federal Public Defender, Norfolk, Virginia, for Appellant. Laura Marie Everhart, Assistant United States Attorney, Norfolk, Virginia, for Appellee. **ON BRIEF:** Frank W. Dunham, Jr., Federal Public Defender, Norfolk, Virginia, for Appellant. Paul J. McNulty, United States Attorney, Norfolk, Virginia, for Appellee.

OPINION

DIANA GRIBBON MOTZ, Circuit Judge:

A jury convicted Marcus Thornton of possession with intent to distribute cocaine base and two firearm offenses. On appeal, he challenges only the district court's refusal to suppress a firearm found in his automobile, maintaining that it was not legally obtained pursuant to a "search incident to arrest." For the reasons that follow, we affirm.

I.

At a pretrial suppression hearing, the parties produced the following evidence.

On July 21, 2001, Officer Deion L. Nichols, of the Norfolk, Virginia Police Department, driving in an unmarked police cruiser, observed a gold Lincoln Town Car pull to his left that "wouldn't come all the way up to [him]." Assuming that the driver of the Lincoln suspected that he was a police officer, Officer Nichols pulled over to a side street and made a right turn. After the Lincoln passed him, Officer Nichols ran a check on the tags. The check revealed that the tags had been issued to a 1982 Chevy two-door car rather than a Lincoln Town Car. Officer Nichols followed the Lincoln, intending to pull it over. The Lincoln was driven into a parking lot, however, before Officer Nichols "had a chance to do so." Thornton parked the Lincoln and exited the vehicle. Officer Nichols "pulled in behind him and exited [his] vehicle." Officer Nichols, who was in uniform, then approached Thornton, asked him for his driver's license, and told him that his tags did not match the registered vehicle.

Thornton "appeared nervous" and "right away started rambling," "licking his lips," and "sweating." He told Officer Nichols that "someone had just given him the car." "For officer safety," Officer Nichols asked Thornton if he had any narcotics or weapons on him. Thornton said no. The officer then asked him if there were any weapons or narcotics in the car. Thornton again said no. Officer Nichols, "again for officer safety," patted Thornton down, after asking if he could do so. Officer Nichols felt a "bulge" in Thornton's front left pocket. The officer "didn't know what it was, so [he] just kind of casually asked Thornton, 'Do you have any illegal narcotics on you?'" Thornton said that he had "a bag of weed." Officer Nichols then asked him if he could have the bag. Thornton "reached into his pocket" and "pulled out two individual bags," one containing three bags of a "green leafy material consistent with marijuana" and the other with a "large amount of an off-white rocklike substance consistent with crack cocaine."

At that point, Officer Nichols handcuffed Thornton and advised him that he was under arrest. (At trial, Officer Nichols testified that he immediately thereafter put Thornton in the back of the patrol car.) Then, "[i]ncident to that arrest," the officer searched the vehicle and found a "BryCo .9-millimeter handgun" under the front driver's seat, where he had observed Thornton sitting. On the way to the police station, Thornton told Officer Nichols, "without any provocation," that he had "just robbed some cat out at Ocean View, and that's where he got the dope."

On December 12, 2001, a grand jury charged Thornton with possession with intent to distribute cocaine base, in violation of 21 U.S.C.A. § 841(a)(1) (West 1999), possession of a firearm after having been previously convicted of a crime punishable by a term of imprisonment exceeding one year, in violation of 18 U.S.C.A. § 922(g)(1) (West 2000), and possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C.A. § 924(c)(1) (West 2000).

Thornton moved to suppress the drugs, his statement, and the firearm on various grounds. After a hearing, the district court denied the motion, finding, *inter alia*, that Officer Nichols lawfully searched Thornton's automobile incident to his arrest and, alternatively, that Officer Nichols could have conducted an inventory search of the automobile.

On February 8, 2002, a jury convicted Thornton on all three counts. Thornton moved for a new trial, again arguing that the automobile search was unlawful. The district court denied the motion based on the earlier suppression ruling. On May 3, 2002, the district court sentenced Thornton to 180 months imprisonment and eight years of

supervised release. Thornton appeals, challenging only the district court's refusal to suppress the firearm; he does not challenge the refusal to suppress the drugs or his statement.

II.

In reviewing the district court's denial of a motion to suppress evidence, we review legal conclusions *de novo* and factual findings for clear error. *See United States v. Weaver*, 282 F.3d 302, 309 (4th Cir. 2002).

Thornton's sole contention on appeal is that the search incident to arrest doctrine, as applied to searches of automobiles in *New York v. Belton*, 453 U.S. 454 (1981), required Officer Nichols to "initiate . . . contact with Thornton, either by actually confronting Thornton, or signaling confrontation with Thornton, while Thornton was still in his vehicle."

A.

It is a well-settled "first principle of Fourth Amendment jurisprudence that the police may not conduct a search unless they first convince a neutral magistrate that there is probable cause to do so." *Belton*, 453 U.S. at 457. In *Chimel v. California*, 395 U.S. 752 (1969), the Court discussed the rationale for and limitations of the "search incident to arrest" exception to that warrant requirement:

> When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area "within his immediate control" — construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.

Chimel, 395 U.S. at 762-63. The Court has often reiterated the "two historical rationales for the 'search incident to arrest' exception: (1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial." *Knowles v. Iowa*, 525 U.S. 113, 116 (1998) (citing, *inter alia*, *United States v. Robinson*, 414 U.S. 218, 234 (1973); *Chimel*, 395 U.S. at 762-63).

The Court in *Belton* applied those rationales to the arrest of an "occupant" of an automobile. *See Belton*, 453 U.S. at 460. In *Belton*, a police officer stopped four men, who had sped past the officer. *Id.* at 455. The officer "gave chase, overtook the speeding vehicle, and ordered its driver to pull it over to the side of the road and stop." *Id.* After examining the driver's license and the vehicle registration, the officer determined that none of the men owned the vehicle. *Id.* During that time, the officer also smelled burnt marijuana and saw, on the floor of the car, an envelope marked "Supergold," which he associated with marijuana. *Id.* at 455-56. Accordingly, the officer directed the men to get out of the car and arrested them for unlawful possession of marijuana. *Id.* at 456. After they exited the vehicle, the officer patted down each of them and "'split them into four separate areas of the Thruway . . . so they would not be in physical touching area of each other.'" *Id.* The officer then searched the passenger compartment; he found Belton's jacket on the back seat, unzipped one of the pockets of the jacket, and found cocaine. *Id.*

The Supreme Court rejected Belton's argument that the search of the passenger compartment of the car exceeded the permissible scope of the search incident to his arrest. The Court began its analysis by observing that for the protection of the Fourth and Fourteenth Amendments to be realized, courts must fashion a clear set of rules that allow police officers to easily determine in most situations "whether an invasion of privacy is justified in the interest of law enforcement." *Id.* at 458 (internal quotation marks omitted). Thus, the Court reasoned,

"[a] single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Id.* (internal quotation marks omitted).

The Court then noted the difficulty courts had experienced in fashioning such a rule in the context of an automobile search incident to an arrest:

> While the *Chimel* case established that a search incident to an arrest may not stray beyond the area within the immediate control of the arrestee, courts have found no workable definition of "the area within the immediate control of the arrestee" when that area arguably includes the interior of an automobile and the arrestee is its recent occupant.

Id. at 460. Because articles within a car's passenger compartment "are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m],'" the *Belton* Court established the "workable rule" that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Id.* at 460 (quoting *Chimel*, 395 U.S. at 763) (footnotes omitted).[1]

B.

Thornton contends that the *Belton* rule does not govern this case because he was not an "occupant of an automobile" when Officer Nichols confronted him. In support of this contention, Thornton relies primarily on a line of authority from the United States Court of Appeals for the Sixth Circuit. *See, e.g., United States v. Hudgins*, 52 F.3d 115, 119 (6th Cir. 1995); *United States v. Strahan*, 984 F.2d 155,

[1]Although using "occupant" in stating its holding, the *Belton* Court also, as noted above, referred to a "recent occupant." *See id.* at 460; *id.* at 463 (Brennan, J., dissenting); *see also United States v. Franco*, 981 F.2d 470, 473 (10th Cir. 1992) (citing *Belton* for the proposition that "[i]ncident to an arrest, police officers may search a vehicle of which the arrestee was a recent occupant").

159 (6th Cir. 1993). In *Hudgins*, the court elaborated on the principle that Thornton urges us to adopt:

> Where the officer initiates contact with the defendant, either by actually confronting the defendant or by signaling confrontation with the defendant, while the defendant is still in the automobile, and the officer subsequently arrests the defendant (regardless of whether the defendant has been removed from or has exited the automobile), a subsequent search of the automobile's passenger compartment falls within the scope of *Belton* and will be upheld as reasonable.
>
> . . . .
>
> . . . However, *where the defendant has voluntarily exited the automobile and begun walking away from the automobile before the officer has initiated contact with him, the case does not fit within Belton's bright-line rule*, and a case-by-case analysis of the reasonableness of the search under *Chimel* becomes necessary.

52 F.3d at 119 (emphasis added). *See also Strahan*, 984 F.2d at 156-57, 159 (following this rule and finding that *Belton* did not apply because police *silently* observed the defendant park and exit his automobile and then immediately apprehended him approximately 30 feet away).

This court has not previously addressed the Sixth Circuit's limitation on the *Belton* rule in a published opinion. We note, however, that other courts of appeals have considered the question. Although one court previously embraced a rule consistent with the Sixth Circuit's limitation, *see United States v. Fafowora*, 865 F.2d 360, 362 (D.C. Cir. 1989) (holding that "ambiguity" necessitating *Belton*'s bright-line rule does not apply "where the police come upon the arrestees outside of an automobile"), three others have refused to do so. *See United States v. Sholola*, 124 F.3d 803, 817 (7th Cir. 1997) (holding that defendant who was next to open car door ready to enter it, was "'positively linked to [car] prior to his arrest'") (quoting *United States v. Adams*, 26 F.3d 702, 705 (7th Cir. 1994)); *United States v. Snook*, 88 F.3d 605, 606 (8th Cir. 1996) (holding that fact that defendant "had

just stepped out of his vehicle as the officer arrived and before his arrest does not alter his status as an 'occupant' of the vehicle"); *United States v. Franco*, 981 F.2d 470, 473 (10th Cir. 1992) (declining to adopt rule, advanced by defendant, that "unless an arrest was made in the arrestee's automobile, a search of the automobile was not 'incident to the arrest' for the purpose of that exception to the warrant requirement").

State courts have also struggled with this issue. *Compare, e.g.*, *State v. Stehman*, 783 N.E.2d 1, 6 (Ill. 2002) ("[W]e find the . . . analysis of the Sixth Circuit Court of Appeals in [*Hudgins*] persuasive."), *with State v. Wanzek*, 598 N.W.2d 811, 815 (N.D. 1999) ("We are not persuaded by the line of cases which hold an arrestee is an occupant only when arrested inside the vehicle or where the police initiate contact with the arrestee before the arrestee exits the vehicle."); *Glasco v. Commonwealth*, 513 S.E.2d 137, 141-42 (Va. 1999) (same).

Given this division, it is not surprising that the Supreme Court recently granted certiorari on the question of whether *Belton*'s "bright-line" rule "is limited to situations in which the officer initiates contact with the occupant of a vehicle while that person remains inside the vehicle." *Florida v. Thomas*, 532 U.S. 774, 776 (2001). In *Thomas*, Florida's highest court expressly adopted the Sixth Circuit's approach. *See Thomas v. State*, 761 So.2d 1010, 1013 (Fla. 1999) ("We find the recent analysis of the Sixth Circuit Court of Appeals in [*Hudgins*] persuasive."). After full briefing and oral argument, however, the Supreme Court dismissed the case for want of jurisdiction. *See Thomas*, 532 U.S. at 781.

After carefully considering the question and the conflicting authority, we join those courts that have rejected the limitation of *Belton* to situations in which "the officer initiates contact with the defendant, either by actually confronting the defendant or by signaling confrontation with the defendant, while the defendant is still in the automobile." *Hudgins*, 52 F.3d at 119. We do so for a number of reasons.

First, the Supreme Court has clearly indicated, albeit in dicta, that an officer may search an automobile incident to an arrest, even if the officer has not initiated contact while the arrestee was still in the automobile. In *Michigan v. Long*, 463 U.S. 1032 (1983), officers on patrol

in a rural area observed a speeding car turn down a road and swerve into a shallow ditch. *Id.* at 1035. When the officers arrived at the scene, they met Long, the sole occupant of the vehicle, "at the rear of the car, which was protruding from the ditch onto the road," with the driver's side door open. *Id.* at 1035-36. Although affirming a subsequent search of the car's passenger compartment as a protective one under *Terry v. Ohio*, 392 U.S. 1 (1968), the Court noted at the outset that "[i]t is clear, and the respondent concedes, that if the officers had arrested Long . . . they could have searched the passenger compartment [under *Belton*]." *Id.* at 1035 n.1. The Court further explained:

> We stress that our decision does not mean that the police may conduct automobile searches *whenever* they conduct an investigative stop, although the "bright line" that we drew in *Belton* clearly authorizes such a search whenever officers effect a custodial arrest. An additional interest exists in the arrest context, *i.e.*, preservation of evidence, and this justifies an "automatic" search.

Id. at 1049 n.14 (emphasis in original); *see also Thomas*, 532 U.S. at 776 (emphasizing the "bright-line" nature of the *Belton* rule).

Further, the historical rationales for the search incident to arrest doctrine — "the need to disarm the suspect in order to take him into custody" and "the need to preserve evidence for later use at trial" — do not permit the limitation on the *Belton* rule that the Sixth Circuit has adopted and Thornton espouses. *Knowles*, 525 U.S. at 116. "'[D]anger to an officer'" from an arrest and the "need to discover and preserve evidence" continue to be concerns regardless of whether the arrestee exits the automobile voluntarily or because of confrontation with an officer. *Id.* at 117-18 (quoting *Robinson*, 414 U.S. at 234-35). Neither the Sixth Circuit nor Thornton suggest otherwise.

Indeed, we believe that Thornton's proposed limitation of the *Belton* rule would raise serious safety concerns for law enforcement personnel. A rule that requires officers to actually confront or signal confrontation with an arrestee while the arrestee is in the automobile, in order to justify a search of the automobile incident to arrest, could very well endanger an officer. For instance, we can certainly imagine the hesitancy of an officer to activate his lights and sirens if the offi-

cer encounters the arrestee while conducting undercover surveillance in an area. Moreover, when encountering a dangerous suspect, it may often be much safer for officers to wait until the suspect has exited a vehicle before signaling their presence, thereby depriving the suspect of any weapons he may have in his vehicle, the protective cover of the vehicle, and the possibility of using the vehicle itself as either a weapon or a means of flight. Mandating that officers alert a suspect to their presence before he sheds the protective confines of his vehicle would force officers to choose between forfeiting the opportunity to preserve evidence for later use at trial and increasing the risk to their own lives and the lives of others. We decline to require officers to make this choice. *See Wanzek*, 598 N.W.2d at 815 (The cases adopting the proposed limitation "raise grave public policy issues because they create serious concerns for the safety of officers and others."); *Thomas*, 761 So.2d at 1014-15 (Wells, J., dissenting) ("The reason for this bright-line rule is officer safety, which is equally as much a concern whether the officer initiates the contact, actually confronts the person, or the person voluntarily exits the vehicle as long as the connection with the vehicle is proximate to the arrest."); *Stehman*, 783 N.E.2d at 11 (Thomas, J., dissenting) ("[W]hether the defendant exits voluntarily or involuntarily, there is always a danger to the officer associated with the subsequent arrest and the proximity of the vehicle.").

Additionally, the limitation on the *Belton* rule that Thornton urges could "encourage individuals to avoid lawful searches of their vehicles by rapidly exiting or moving away from the vehicle as officers approached." *Wanzek*, 598 N.W.2d at 815. Surely, "[p]olice officers should not have to race from their vehicles to the arrestee's vehicle to prevent the arrestee from getting out of the vehicle in order to conduct a valid search." *Id.*

Nonetheless, we recognize the concerns of those courts that have attempted to limit the scope of *Belton* to situations in which officers have initiated contact with arrestees while still in the automobile. The *Belton* rule cannot be stretched so as to render it limitless by permitting officers to search any vehicle from which an arrestee has emerged, regardless of how much time has elapsed since his exit or how far he is from the vehicle when arrested.

In the case at hand, however, we note that Thornton concedes that he was in close proximity to his vehicle when Officer Nichols approached him. His concession is well-taken. Although the record is not clear as to the precise distance between Thornton and his automobile when Officer Nichols confronted him, the record does conclusively show that Officer Nichols observed Thornton park and exit his automobile and then approached Thornton *within moments*.

Thus, "no doubt exists that the car was within [Thornton's] immediate control at the beginning of his encounter with" Officer Nichols. *See United States v. Johnson*, 114 F.3d 435, 440 (4th Cir. 1997) (so noting in case involving question of unreasonable delay between arrest and search of car). Stated differently, Thornton "was 'positively linked' to the searched vehicle prior to his arrest." *Sholola*, 124 F.3d at 817 (quoting *Adams*, 26 F.3d at 705); *id.* at 823 (Wood, J., concurring) ("The 'positive link' required must, in keeping with *Belton*, be one that requires physical proximity that is the equivalent of occupancy of the automobile."); *see also Franco*, 981 F.2d at 473 (affirming validity of search under *Belton* because defendant "was a recent occupant of his vehicle[,]" "the arrest was made in close proximity to his vehicle[,]" and "[d]uring the illegal transaction [defendant] exercised control over his vehicle and its contents"). The conceded close proximity, both temporally and spatially, of Thornton and his car at the time of his arrest provides adequate assurance that application of the *Belton* rule to cases like this one does not render that rule limitless.[2] Accordingly, we hold that Officer Nichols lawfully searched Thornton's automobile incident to the arrest. Because we affirm on this ground, we decline to reach the district court's alternative holding that Officer Nichols could have conducted a lawful inventory search.

[2]We also note that circuit precedent, which Thornton does not challenge, permitted Officer Nichols to separate Thornton from the vehicle (in this case by handcuffing him and placing him in the patrol car) prior to the search. *See United States v. Milton*, 52 F.3d 78, 80 (4th Cir. 1995) (holding that *Belton* "applies even if the arrestee has been separated from [the vehicle] prior to the search of the passenger compartment" (internal quotation marks omitted)); *see also* 3 Wayne R. LaFave, *Search & Seizure* § 7.1(c), at 448-49 (3d ed. 1996 & Supp. 2003) ("[U]nder *Belton* a search of the vehicle is allowed even after the defendant was removed from it, handcuffed, and placed in the squad car, or even if a single defendant was in the custody of several officers.") (footnotes omitted)).

III.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

ORIGINAL

No. 03-5165

Supreme Court, U.S.
FILED
SEP 3 2003
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

MARCUS THORNTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a police officer may search the passenger compartment of an automobile as a contemporaneous incident of the lawful custodial arrest of the vehicle's recent occupant when the arrestee exited the vehicle voluntarily rather than on police direction.

IN THE SUPREME COURT OF THE UNITED STATES

No. 03-5165

MARCUS THORNTON, PETITIONER,

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 325 F.3d 189. The opinion of the district court is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 3, 2003. The petition for a writ of certiorari was filed on July 1, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for

the Eastern District of Virginia, petitioner was convicted of possession of cocaine base with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Count 1); possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g)(1) (Count 2); and possession of a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c) (Count 3). Petitioner was sentenced to concurrent terms of 120 months of imprisonment on Counts 1 and 2, and to a consecutive term of 60 months of imprisonment on Count 3, to be followed by eight years of supervised release. The court of appeals affirmed. Pet. App. A1-A12.

1. On July 21, 2001, Police Officer D. L. Nichols, who was patrolling an area of Norfolk, Virginia, in an unmarked police car, observed a Lincoln Town Car whose driver (petitioner) would not pull up to Nichols's own vehicle. Believing that the driver suspected that he was a police officer, Nichols pulled over to a side street. After the Lincoln passed by, Nichols ran a computer check on the vehicle's tags. The check revealed that the tags had been issued to a 1982 Chevrolet-model vehicle. Nichols pursued the Lincoln with the intent of stopping petitioner for driving without proper tags. Petitioner, however, turned into a shopping center parking lot before Nichols could make a traffic stop. Petitioner parked his car and exited it. Pet. App. A1-A2.

Nichols pulled in behind petitioner's vehicle and exited his

car. Nichols, who was in uniform, approached petitioner and asked for his driver's license, explaining that the tags on his car did not match the registered vehicle. Petitioner "appeared very nervous"; he "right away started rambling," "licking his lips," and "sweating." Pet. App. A1. Petitioner told Nichols that someone had given him the car. Nichols asked petitioner if he had any narcotics or weapons on him or in his car; petitioner said no. Ibid.

Nichols conducted a brief pat-down of petitioner after asking for his consent. During the pat-down, Nichols detected a "bulge" in petitioner's front left pocket, prompting him to ask petitioner whether he had any narcotics on him. Pet. App. A1-A2. Petitioner responded that he had "some weed." Id. at A2. Nichols asked petitioner to remove it from his pocket, at which time petitioner reached into his pocket and produced two bags, one containing a green leafy substance that appeared to Nichols to be marijuana, and one containing a large amount of a white rocklike substance that appeared to Nichols to be crack cocaine. Nichols arrested petitioner and then searched his vehicle. The search revealed a loaded semi-automatic pistol under the driver's seat. Ibid.

2. Before trial, petitioner moved, inter alia, to suppress the firearm found in his vehicle. Among other things, petitioner argued that the warrantless search of his vehicle could not be justified as a search incident to arrest under New York v. Belton,

453 U.S. 454 (1981), because petitioner had voluntarily exited his vehicle before he was confronted by the officer, as opposed to having been ordered out of the car.* The district court denied petitioner's motion and held that Officer Nichols's search of petitioner's vehicle was valid under Belton. Order 6 (1/28/02).

After a two-day trial, a jury found petitioner guilty on all counts. Petitioner moved for a new trial, reiterating his argument that the search of the vehicle was not authorized by Belton. The district court denied that motion on the basis of its earlier ruling denying the motion to suppress. Order 1-2 (2/19/02).

3. The court of appeals affirmed. Pet. App. A1-A12. The court noted the divergence of opinion among the lower state and federal courts concerning Belton's application to contemporaneous searches of automobiles where, as here, the arrestee has voluntarily exited the vehicle. Id. at A2. Siding with the majority of the courts that have considered that question, the Fourth Circuit rejected the argument that Belton is limited "to situations in which the officer initiates contact with the defendant, either by actually confronting the defendant or by signaling confrontation with the defendant, while the defendant is still in the automobile." Id. at A4 (internal quotation marks

---

* In Belton, this Court held that, whenever "a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of the vehicle." 453 U.S. at 460.

omitted).

The court of appeals explained that this Court's own decisions "clearly indicate, albeit in dicta, that an officer may search an automobile incident to an arrest, even if the officer has not initiated contact while the arrestee was still in the vehicle." Pet. App. A4 (citing Michigan v. Long, 463 U.S. 1032, 1035-1036 & n.1 (1983)). Furthermore, the court stated, "the historic rationales for the search incident to arrest doctrine -- 'the need to disarm the suspect in order to take him into custody' and 'the need to preserve evidence for later use at trial' -- do not permit [a] limitation on the Belton rule" based on "whether the arrestee exits the automobile voluntarily or because of confrontation with an officer." Ibid. Indeed, the court observed, "[a] rule that requires officers to actually confront or signal confrontation with an arrestee while the arrestee is in the automobile, in order to justify a search of the automobile incident to arrest, could very well endanger an officer." Ibid.

Because the court of appeals held that the vehicle search was valid under Belton, it did not "reach the district court's alternative holding that Officer Nichols could have conducted a lawful inventory search." Pet. App. A5.

DISCUSSION

Petitioner urges (Pet. 5-6) this Court to grant certiorari to resolve the conflict among the lower courts over whether Belton's

bright-line rule applies where, as here, the arrestee exited his vehicle voluntarily, rather than on police direction, moments before he was confronted by police. As petitioner notes (Pet. 5), the Court recently granted certiorari to resolve that same question in Arizona v. Gant, 43 P.3d 188 (Ariz. App. 2002), cert. granted, 123 S. Ct. 1784 (2003) (No. 02-1019) (to be argued November 5, 2003). The petition in this case should be held pending the disposition in Gant.

As the United States has explained in its amicus brief in Gant, and as the Fourth Circuit correctly concluded in this case, see Pet. App. A4-A5, the application of Belton does not depend on the reason that an arrestee exited his car, and Belton thus squarely applies to the type of fact pattern underlying the search in this case. If the Court reaches that conclusion in Gant, the petition in this case should be denied. If the Court reaches the opposite conclusion in Gant, then the Court should grant the petition in this case, vacate the decision below, and remand for consideration of whether the district court's decision to deny petitioner's motion to suppress is supported by other grounds, which the court of appeals did not need to reach in disposing of this case based on the application of Belton. See id. at A5.

CONCLUSION

The petition for a writ of certiorari should be held pending the disposition of Arizona v. Gant, No. 02-1019, and be disposed of in accordance with the Court's decision in Gant.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

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SEPTEMBER 2003

No. 03-5165

Supreme Court, U.S.
FILED
NOV 28 2003
OFFICE OF THE CLERK

In The Supreme Court of the United States

MARCUS THORNTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

JOINT APPENDIX

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Petition For Writ Of Certiorari Filed July 1, 2003
Certiorari Granted November 3, 2003

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THORNTON v. UNITED STATES

RELEVANT DOCKET ENTRIES

United States District Court
Eastern District of Virginia (Norfolk)

CRIMINAL DOCKET FOR CASE #: 01-CR-235-1

11/15/01	1	CRIMINAL COMPLAINT as to Marcus Thornton, filed. [2:01-m-603] (nlyt) [Entry date 11/15/01]

* * *

12/12/01	9	INDICTMENT RETURNED AND FILED IN OPEN COURT as to Marcus Thornton (1) count(s) 1, 2, 3. On motion of govt. Court directed summons to issue for arraignment on 12/19/01 at 9:00 a.m. (arou) [Entry date 12/13/01]

* * *

12/19/01	–	Arraignment as to Marcus Thornton held before Magistrate Judge Tommy E. Miller (Richard Zahn, contract court reporter) USA appeared through Laura Everhart, AUSA; Deft appeared through Walter Dalton, FPD. Prelim. Motion Filings due 1/4/02 w/responses due w/in 11 days thereafter; Jury Trial set for 10:00 2/7/02. Deft waived formal arraignment; Deft plead not guilty; jury demanded. Court stated that deft must be present at prelim hearings unless he executes & files waiver of appearance form. Deft continued on present bond. Walter Dalton, FPD (arou) [Entry date 12/19/01]

* * *

1/7/02	11	MOTION by Marcus Thornton to Suppress (arou) [Entry date 01/08/02]

1/7/02	12	MEMORANDUM by Marcus Thornton in support of [11-1] motion by Marcus Thornton to Suppress, received (arou) [Entry date 01/08/02]
1/11/02	13	RESPONSE by USA as to Marcus Thornton re [11-1] motion by Marcus Thornton to Suppress (arou) [Entry date 01/11/02]

* * *

1/24/02	–	Motion hearing held as to Marcus Thornton re: [11-1] motion by Marcus Thornton to Suppress before Judge Henry C. Morgan Jr. (Diane Gray.) USA appeared through: Laura Everhart, AUSA. Dft(s) (on bond) appeared through: Walter Dalton, FPDA. Govt. pres. evidence. Court's findings read into record. Motion DENIED. Court to prepare order & kept file. Dft. cont. on present bond. (danc) [Entry date 01/25/02]
1/28/02	14	OPINION & ORDER as to Marcus Thornton denying [11-1] motion by Marcus Thornton to Suppress as to Marcus Thornton (1) (Signed by Judge Henry C. Morgan Jr. on 1/28/02) & filed on 1/28/02. cc to Counsel & AUSA (popo) [Entry date 01/29/02]

* * *

2/7/02	–	Jury trial proceedings as to Marcus Thornton held before Judge Rebecca B. Smith (Gloria Smith, OCR.) USA appeared through: Laura Everhart, AUSA. Dft(s) appeared, on bond, through: Walter B. Dalton, AFPD. Matter came on for trial by jury. Jury appeared as summoned and were sworn on their voir dire. 12 jurors and 2 alternate jurors were selected. Jurors not selected were excused subject to call. Opening statements heard. Witnesses were excluded from the courtroom.

Gov't presented evidence and rested. Out of the presence of the jury, deft. moved for judgment of acquittal pursuant to Rule 29. Court ruled from the bench and denied the motion. Deft. presented evidence and rested. Deft. renewed motion and court denied motion. Jurors excused and court adjourned until Friday morning, February 8, 2002, at 11:00 a.m. (mgra) [Entry date 02/07/02]

* * *

2/8/02	–	Continuation of jury trial proceedings as to Marcus Thornton held before Judge Rebecca B. Smith (Gloria Smith, OCR.) USA appeared through: Laura M. Everhart, AUSA. Dft(s) appeared through: Walter B. Dalton, AFPD. Counsel and deft. appeared. Court and counsel reviewed jury instructions. Jurors appeared. Final arguments of counsel heard. Jury received court's charge and retired to jury room to begin their deliberations. Sometime later, the jury returned with the following verdict (attached). Jurors polled, all answered in the affirmative. Special Jury Verdict Form, filed. Jurors excused subject to call. Court granted govt's request to substitute photographs for the drugs and firearm. Sentencing set for Friday, [May] 3, 2002, at 10:00 a.m. Court detained deft. until his sentencing. Deft. remanded. (mgra) [Entry date 02/08/02]
2/8/02	16	JURY VERDICT as to Marcus Thornton Guilty: Marcus Thornton (1) count(s) 1, 2, 3 (mgra) [Entry date 02/08/02]

* * *

2/15/02	17	MOTION by Marcus Thornton for New Trial (popo) [Entry date 02/15/02]

2/15/02 18 MEMORANDUM by Marcus Thornton in Support of [17-1] Motion for New Trial (popo) [Entry date 02/15/02]

* * *

2/19/02 20 ORDER denying [17-1] motion for New Trial as to Marcus Thornton (1), entered and filed 2/19/02 (Signed by Judge Rebecca Smith) Copies Mailed: 2/19/02, ob (arou) [Entry date 02/19/02]

2/20/02 21 RESPONSE by USA re [11-1] motion by Marcus Thornton to Suppress (arou) [Entry date 02/20/02]

* * *

5/6/02 24 JUDGMENT Marcus Thornton (1) count 1: 120 MONTHS IMPRISONMENT; 8 YEARS SUPERVISED RELEASE; $100.00 SPECIAL ASSESSMENT. Count 2: 120 MONTHS IMPRISONMENT TO BE SERVED CONCURRENTLY WITH COUNT 1; 3 YEARS SUPERVISED RELEASE TO BE SERVED CONCURRENTLY WITH COUNT 1; $100.00 SPECIAL ASSESSMENT. Count 3: 60 MONTHS IMPRISONMENT TO BE SERVED CONSECUTIVELY WITH COUNTS 1 AND 2; 5 YEARS SUPERVISED RELEASE TO BE SERVED CONCURRENTLY WITH COUNTS 1 AND 2; $100.00 SPECIAL ASSESSMENT. ent 5/3/02 and filed 5/6/02 (Signed by Judge Rebecca B. Smith) Copies Mailed: 5/7/02 (scar) [Entry date 05/07/02]

* * *

5/9/02 25 NOTICE OF APPEAL by defendant. (ssha) [Entry date 05/10/02]

* * *

RELEVANT DOCKET ENTRIES

GENERAL DOCKET FOR
U.S. Court of Appeals for the Fourth Circuit

Court of Appeals Docket #: 02-4382

5/14/02 Criminal case docketed. (amy)

* * *

7/30/02 Brief and joint appendix filed by Appellant Marcus Thornton. Copies of brief: 6 # brf pages: 28 Sufficient [Y/N]?: Y. Copies of apx: 5 # apx pages: 249. 2-sided copying [Y/N]?: Y. Method of filing w/ court: HD Date of Service on parties: 7/30/02 Type of service on parties: HD Appellee brief due 8/20/02 for US. [02-4382] (aweb)

8/19/02 Brief filed by Appellee US. Copies of brief: 8 # brf pages: 14. Sufficient [Y/N]?: y. SEALED? [Y/N]: n. Method of filing w/ court: PM Date of Service on parties: 8/19/02 Type of service on parties: PM [02-4382] (mft)

8/29/02 Reply brief filed by Appellant Marcus Thornton. Copies of brief: 6 # brf pages: 12. Sufficient [Y/N]?: Y. SEALED [Y/N]?: N. Method of filing w/ court: pm Date of Service on parties: 8/29/02 Type of service on parties: pm [02-4382] (sn)

* * *

2/24/03 Oral argument heard. Courtroom Deputy: JLC, Jr. [02-4382] (jc)

4/3/03 Published, authored opinion filed. [02-4382] (sn)

4/3/03 Judgment order filed. Decision: affirmed. EOD Date: 4/3/03. [02-4382] (sn)

4/25/03 Mandate issued. [02-4382] (sn)

* * *

---

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MARCUS THORNTON,
Defendant.

DOCKET NO.
2:01cr235

TRANSCRIPT OF MOTION TO SUPPRESS
PAGES 1-25

BEFORE THE HONORABLE
HENRY COKE MORGAN, JR.
UNITED STATES DISTRICT JUDGE

January 24, 2002

11:00 a.m.

APPEARANCES:

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Appearing on behalf of the United States
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Attorneys for the Defendant
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COURT STAFF PRESENT:
Cordel Faulk, Law Clerk
Sandra Dance, Deputy Courtroom Clerk
John V. King, Court Security Officer
Diane M. Gray, Official Court Reporter

[2] (Proceedings commenced at 11:05 a.m.)

THE CLERK: Case number 2:01cr235, United States of America versus Marcus Thornton.

Ms. Everhart, is the government ready to proceed?

MS. EVERHART: United States is ready, Your Honor.

THE CLERK: Mr. Dalton, is the defendant ready to proceed?

MR. DALTON: We're ready, Your Honor.

THE COURT: All right. Counsel, in reading your memorandum, there doesn't seem to be any factual dispute; am I correct in that?

MS. EVERHART: I would think that that was probably correct, Your Honor. I know that Mr. Dalton, he was provided with discovery, of course, and got all of the officer's reports, which not every detail of the arrest was included in his reports, but the essential facts, I think, are the same.

THE COURT: Well, I don't know whether it's necessary to present factual evidence on both sides or not. I just read the two briefs, and there just didn't seem to be any difference in their recitation of the facts.

MS. EVERHART: I think other than a few details, Your Honor, that's correct.

MR. DALTON: I believe that is correct, Your Honor.

THE COURT: Well, if there are a few details in dispute, those details might be important.

[3] MS. EVERHART: Your Honor, I think I'd like to call the officer just to make sure that the record is clear.

THE COURT: All right.

MS. EVERHART: That would be Officer Nichols.

OFFICER DEION L. NICHOLS, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. EVERHART:

Q. Could you state your name, please, sir, and tell us where you are employed?

A. Officer Deion L. Nichols, Norfolk Police Department.

Q. Were you so employed on July 21st, 2001?

A. Yes, I was.

Q. On that date did you have occasion to have some contact with the defendant, Marcus Thornton?

A. Yes, I did.

Q. And is the defendant seated next to Mr. Dalton at the table?

A. Yes.

Q. Could you tell us what first drew your attention to the defendant?

A. I was in an unmarked police unit, and I was in the 7100 block of Sewells Point Road. I observed a gold Lincoln Town Car in my side or rearview mirror kind of pull up to the left side of me, but it wouldn't come all the way up to me, and I [4] assumed that the person in the car spotted and knew that I was a police officer and started to slow down for whatever reason.

Q. Okay. You were in an unmarked car?

A. I was in an unmarked car.

Q. Go on.

A. And it kind of red-flagged me for a second. I said, "I wonder why this person is not pulling up to me." So I slowed down. And the person in the car began to slow down even more. And so I said okay. I pulled over to a side street, made a right turn and looped my car around, and as the car passed me, I got in behind it, and I ran the tags on the car.

It was a gold Lincoln Town Car with the tags Yankee Henry William 3564, and those tags came back to an '82 Chevy two-door.

So I followed the individual, Mr. Thornton, into the 7600 block of Sewells Point Road, which is a parking lot. He parked his car and exited the vehicle. I pulled in behind him and exited my vehicle also.

Q. Now, was Mr. Thornton, did that car that you pulled Mr. Thornton over in, was that the car that you had initially seen?

A. No.

Q. Tell us about that a little bit.

A. I guess it was a gold car in color, and I was wondering why, again, why this person wouldn't pull up completely at my [5] side, and so I – again, I made the right turn, and I just waited for this car to come by me so I can check this guy out who was driving, and I assumed it was the same car, so I pulled in behind him, and that's when I ran the tag.

And when I noticed it didn't come back to that car, didn't match that car, I followed the car until it parked at 7600 Sewells Point Road.

Q. So Mr. Thornton got out of his car, you got out of your car, and then what happened?

A. I approached him, asked him for his driver's license, and I told him right up front that the tags on his car doesn't come back to his vehicle. He appeared nervous, right away started rambling and saying that –

THE COURT: You were not in uniform, I assume.

THE WITNESS: Yes, I was.

THE COURT: You were in uniform?

THE WITNESS: I was in an unmarked car, Judge, but in uniform with my badge on display.

THE COURT: All right.

THE WITNESS: He started rambling and licking his lips. He was sweating. He said that someone

had just given him the car. I told him to calm down. I asked him why was he so nervous. He stated for no reason.

For officer safety, I asked him if he had any narcotics or weapons on him. He stated no. I asked him was [6] there any weapons or narcotics in the car. He said no. I patted him down, again for officer safety. I felt a bulge in his left front pocket.

BY MS. EVERHART:

Q. Okay. Now, did you ask him if you could pat him down for officer safety?

A. Yes.

Q. Okay. Go on.

A. And I felt a bulge in his left front pocket. I didn't know what it was, so I just kind of casually asked him, "Do you have any illegal narcotics on you?" He lowered his head and said, "Yeah, I have a bag of weed." I simply asked him if I could have it.

He reached into his pocket and pulled out two individual bags, one containing three bags of a green leafy material consistent with marijuana, and the other with a large amount of an off-white rocklike substance consistent with crack cocaine. I handcuffed him at that point, advised him that he was under arrest.

Incident to that arrest, I searched the vehicle, which he was the sole occupant of, and found a BryCo .9-millimeter handgun right under the front driver's seat where he was sitting at in the car.

Q. And just so the record is clear, when you asked him if you could pat him down for officer safety, he said yes?

[7] A. Yes.

Q. And he was the one who took the items out of his pocket, not you?

A. He reached into his own pocket and gave me those items himself.

Q. What happened on the way to the police station?

A. He told me that – without any provocation from me, he told me that he had just robbed some cat out at Ocean View, and that's where he got the dope from.

Q. That was just a spontaneous statement on his part?

A. Yes.

MS. EVERHART: Please answer any questions Mr. Dalton or the court may have for you.

CROSS-EXAMINATION

BY MR. DALTON:

Q. Officer Nichols, you did indicate to the court that you were in uniform on that day?

A. Yes, I was.

Q. And you were alone. There was no one else in your unit with you?

A. That's correct.

Q. But you were in an unmarked police car; is that correct?

A. Yes, I was.

Q. I'm trying to make sure I understand what your earlier testimony was about the vehicle you first observed. You're [8] saying that there was a different car that you thought the driver recognized you as a police officer, and that aroused your suspicion?

A. Yes. Similar car in size and shape, even down to the color, but it wasn't that car. It aroused my suspicion because he's wouldn't pull completely up to me. I thought maybe the guy saw my arm out the window, saw my badge and kind of laid back a little bit, and it kind of just aroused my suspicion a little bit.

Q. Did you run a check on the tag on that vehicle?

A. No. Because he wouldn't pull up to me. He wouldn't pull up to me, so I pulled into a side street on the right and looked around real quick, and as Mr. Thornton's car passed me, I pulled in behind him, and that's when I ran a check on the tag, and it revealed that it didn't belong on that car.

Q. When you ran the check on Mr. Thornton's vehicle, did you believe it was the same vehicle?

A. I believed, yes. it was. I thought it was. I mean, I didn't know. Yeah, I thought it was. I just ran a check on that tag to see who this guy was.

Q. So you weren't just running a random check on Mr. Thornton's vehicle?

A. No. I thought it was the guy. Then I found out later on probably it wasn't the guy because the car was a little smaller, but at that time I thought it was the individual who [9] would not pull up to me.

Q. Do you recall testifying in a preliminary hearing in Norfolk General District Court on September 24th of 2001 in this matter when it was in state court?

A. I believe I –

Q. Mr. Thornton had some state charges that were then pending, and you testified at his preliminary hearing in Norfolk General District Court, Courtroom Number 5, on September 24th, 2001?

A. I can't remember the date.

Q. Do you recall testifying previously at any time in state court about this same subject matter of why you stopped Mr. Thornton?

A. Yes, I do.

Q. Do you recall –

MS. EVERHART: Excuse me. Could I have a page and line number?

MR. DALTON: Page 5, starting around line 14.

BY MR. DALTON:

Q. Do you recall you were asked the question by Christine Bruen with the Norfolk Commonwealth Attorney's Office about describing why you came into contact with Mr. Dalton?

THE COURT: Mr. Dalton, if you are going to use the transcript, I'm going to ask you to quote it verbatim, not paraphrase it.

[10] MR. DALTON: Yes, sir.

BY MR. DALTON:

Q. Do you recall testifying in court and having Christine Bruen of the Norfolk Commonwealth Attorney's Office ask you questions on a direct examination regarding charges against Mr. Thornton?

A. Yes.

Q. She asked you a question, I'm quoting now, "Please describe to the court how it was you came in contact with Mr. Thornton."

And your answer then was: "It was about 11:30 on 7-21 of this year in the city. I observed the defendant driving a gold Lincoln Town Car with Virginia tags Henry William 2564 in the 7600 block of Sewells Point Road. I just randomly ran a check on the tag, and it came back to a 1982 Chevy two-door. I followed the vehicle into a parking lot of the 7600 block of Sewells Point Road."

Do you recall testifying to that effect?

A. That wasn't the tag number I had in my notes. The tag number I have is Yankee Henry William 3564.

Q. Okay. But how about the statement that you apparently made on that day, "I just randomly ran a check on the tag, and it came back to a 1982 Chevy two-door"?

A. When I pulled in behind him, that's when I ran the tag.

Q. But in other words, it was not a random check; you were [11] running a check for this other reason that you stated about this other car having previously gone by you?

A. Yes. The car didn't go by me. He wouldn't pull up to me. I pulled in to the right and looked around and got in behind the vehicle.

Q. Now, you said Mr. Thornton pulled his vehicle over and parked and got out; is that correct?

A. Yes. He pulled into a parking lot, exited his vehicle. I pulled in behind him, exited my vehicle.

Q. So he had already stopped and gotten out of the vehicle before you could pull him over or anything of that nature?

A. Yeah, that's correct.

Q. Had you intended to stop the vehicle because of the irregularity about the tags?

A. Yes, I was. I would have, but he pulled into the parking lot before I had a chance to do so.

Q. Now, when you walked up to him, you said you told him right off the bat that the tags didn't match the vehicle he was driving; is that correct?

A. Yes. I asked for his driver's license first, and then I told him that the tags didn't belong on the car.

Q. Now, when you ran the tags, they came back registered to a different vehicle; is that correct?

A. Came back to an '82 Chevy two-door.

Q. And that '82 Chevy two-door is registered in the name of [12] Marcus Thornton, was it not?

A. I don't know.

Q. You don't know who it was registered to?

A. I can't recall. I didn't put that in my notes whether it came back to him or not, but it didn't belong on that Lincoln Town Car.

Q. And once you determined that it didn't match, were you suspicious that the car was stolen or something of that nature?

A. I didn't know whether it was stolen or not. I did do a VIN check on the car later, and the car was not stolen.

Q. So the car was not stolen, and you did check that out?

A. Yes.

Q. At what point did you do that?

A. After I took the tags off the car, I went over and contacted the dispatcher and ran the VIN to see – I believe it came back to somebody in Virginia Beach, I believe. I'm not sure.

Q. Did you pursue any sort of charges against Mr. Thornton regarding the irregularity about the tags?

A. I don't believe I wrote him a summons, but I don't know. I can't recall.

Q. There is some citation you could have given him?

A. I could have given him tags from another vehicle on his car.

[13] Q. But you didn't do that; right?

A. I don't believe I did. I can't recall writing him a summons. I just focused on the more serious charge, which was this.

Q. At the point where you had him, he's parked and out of the car, you're parked, out of your car, and you approach him and ask him for his driver's license, he gave that to you, didn't he?

A. I don't recall whether it was an I.D., but he gave me some kind of identification, I believe.

Q. And did it appear to match up? Was it a picture I.D.?

A. I believe so, yes.

Q. And you said when you started talking about the tags not matching, that he appeared to you to be nervous; is that correct?

A. Very nervous, sweating. His eyes were going back and forth and licking his lips.

Q. This was in July, right, July 21st?

A. Yes.

Q. Around midday?

A. 11:30, yes.

Q. Kind of warm, wasn't it?

A. Yeah, I guess so. I can't recall the weather.

Q. Do you routinely stop people for traffic violations and have them not be nervous?

[14] A. I mean, he appeared to be overly nervous, overly nervous.

Q. Now, you indicated that when you decided for your own safety that you had to ask him if he had any, I believe as you put it, any narcotics or weapons on him; is that correct?

A. Yes.

Q. Why did you include narcotics if it was for your safety?

A. It's just a question that I ask. When people are nervous like that, I just – I've done this a whole lot, and usually when people's demeanor is like that, they are trying to hide something, and that's almost always the case, and in this case it was also.

Q. So you thought he was trying to hide something, that's why you pursued that line of questioning?

A. Yes.

Q. And you said that you asked him if you could do a patdown before you did a patdown?

A. Yes. Asked him if he had any narcotics. "Do you mind if I pat you down real quick?" I patted him down and felt a bulge in his pocket.

Q. Okay. What did the bulge feel like? Could you describe that to the court, please?

A. It was just a bulge. It could have been tissue paper or it could have been anything. I just asked him, "Do

you have any narcotics on you, any illegal narcotics?" He said, "I've [15] got some marijuana, some weed on me."

Q. So from the patdown, the way it felt, you said it could have been anything?

A. It could have been anything. I didn't know what it was, but I wanted to find out what it was, so I asked him.

Q. Well, in other words, it didn't immediately indicate to you that it was a weapon, did it?

A. It wasn't hard.

Q. And it definitely wasn't some sort of contraband like a big chunk of crack cocaine or something that you could obviously feel?

A. I didn't know what it was. That's why I asked him.

Q. At that point you said instead of – did you ask him for a consent to search his person at that point?

A. I patted him down. I didn't dig my hands into his pocket or anything like that. Just the outer part of him.

Q. I'm not trying to trick you. I'm just trying to follow through this.

You said you asked for consent for the patdown, and then you did it; right?

A. Yes.

Q. Did you ask for consent to search after you felt the bulge?

A. I didn't search him.

Q. I know that. I know you said that before. But you [16] didn't ask him, "is it okay to search you?" Did you? I mean, you didn't ask him, "Is it okay if I search you?"

A. I can't recall whether I did or not.

Q. Instead, you said you asked him if he had any narcotics on him?

A. I asked him, "Do you have any illegal narcotics?" And he said –

Q. And you said in response to that, he said he had some weed?

A. Yes.

Q. And then did you ask for any consent to search at that point?

A. No. I just asked, "May I have the weed? May I have the narcotics?" And he reached into his pocket.

Q. And he gave it to you?

A. Yes.

MR. DALTON: I don't believe I have any other questions, Your Honor.

MS. EVERHART: I have no further questions, Your Honor.

THE COURT: All right. Thank you, Officer. You may step down.

THE WITNESS: Thank you.

THE COURT: Does the government have any further evidence?

[17] MS. EVERHART: No, Your Honor.

THE COURT: Does the defendant wish to present any evidence.

MR. DALTON: No, sir.

THE COURT: All right. Does the government have any argument?

MS. EVERHART: Your Honor, I believe I set out my argument in my response to the defendant's motion. But just briefly, this was a Terry-stop, and the officer was certainly perfectly well within his rights and well within the bounds of the Constitution to have run the man's tags even if he didn't have any suspicion. They are out in plain view on the road, and I think police officers probably do that quite frequently, and at that point he knew that there was something wrong.

The man obviously was in violation of the law, and he was well within the bounds of the Constitution to approach him and ask him questions without advising him of his Miranda rights. To ask if he could pat him down. The defendant consented. The defendant admitted that he had drugs on his person and handed them over voluntarily to the police officer in the case.

There was no actual search by the police officer, and certainly he was well within his rights to search the vehicle in this case. First of all, because it was incident to a lawful arrest, and also because he could not leave the car in [18] that condition or allow it to be drived – driven away, rather, because the tags did not match the vehicle, so it would have had to have been impounded in any event.

So, Your Honor, for these reasons, we believe that the searches in this case and the statements should all be admissible. Thank you.

MR. DALTON: Your Honor, while I understand that the officer may have been justified initially, I think it's still questionable as to why he initially was having contact with Mr. Thornton, but even if you get beyond the point where he's – it's not really even a traffic stop. He said he intended to stop him, but Mr. Thornton had already stopped. He approached him –

THE COURT: Well, there's no complaint about him running the license plate, is there?

MR. DALTON: Well, I think it's – there's no question that he ran it, Your Honor. This is the first time today that I've learned this aspect of it about observing a different vehicle and apparently thinking that was the same vehicle.

THE COURT: Does it make any difference why he ran it?

MR. DALTON: I don't know that it does, Your Honor, but moving on to where I think the –

THE COURT: I don't think it does. I don't see any [19] reason why a law enforcement officer can't check any license plate that he wants to. There's no invasion of anyone's privacy of running a license plate.

MR. DALTON: Yes, sir. I think the problem comes in, Your Honor, after Mr. Thornton has parked his vehicle and gotten out. The officer parks his vehicle and gets out and approaches Mr. Thornton. He asked him for some identification. He provides that.

The only thing that he's got to go on at that point after having run the license plate is that it comes back registered to a different vehicle, so Ms. Everhart in her pleading indicates that the officer was justified in suspecting things like perhaps it was a stolen car. Well, he apparently ran the VIN, and it was not stolen.

THE COURT: I think he ran the VIN, as I understood it, after he had completed the arrest and so forth.

MR. DALTON: That may be the case, Judge. I believe that you're correct there.

THE COURT: That's the way I understood his testimony. He said when he was removing the license plates, he ran the VIN.

MR. DALTON: Yes, sir. That is consistent with what I'm representing to the court, and I think the problem here is that rather than pursue the investigation of the irregularity about the tags, the officer's immediate attention turned to [20] weapons and narcotics.

The first thing he apparently said to him was that for his own safety, as he put it, that he asked if Mr. Thornton had any weapons – excuse me, narcotics, actually first, or weapons on him, and he said no. And it turns out he didn't have any weapons on him. He asked him if he had anything like that in the car. He said no.

Then the officer was candid, apparently, and indicated that he thought he was trying to hide something, so he patted him down, didn't know what it was, and instead of asking for a consent to search or anything like that, he just goes ahead and asks him again, "Do you have any narcotics on you?" Mr. Thornton at that point admitted to

him that he had weed in his pocket. Again, instead of asking for any consent to search, he asked him to take it out.

I would submit, Your Honor, that this is exceeding the scope of a Terry-stop, and the case law, I would submit, supports our position. The case of *United States versus Rusher*, a Fourth Circuit case that's cited in my motion, states that in carrying out a routine traffic stop, a law enforcement officer, quote, may request a driver's license and vehicle registration, run a computer check and issue a citation. Any further detention for questioning is beyond the scope of the Terry-stop and, therefore, illegal unless the officer has a reasonable suspicion of a serious crime.

[21] All this officer could really articulate was that he thought that Mr. Thornton was trying to hide something was the way he put it. I would submit he had no articulable suspicion that Mr. Thornton was armed before he even did the patdown. All he's really stopped him for is perhaps being in a stolen car or putting the license plates from one car onto another car. He didn't even pursue that at all. He admitted that. He didn't charge him with that. He didn't even pursue it.

His attention immediately focused to I've got a young man here, and he starts asking him about weapons and drugs, and I would submit that that exceeds the bounds of a traffic stop under *Rusher*. It's not a good Terry-stop. He exceeded the – what he would be allowed to do properly under that.

And I think along the lines of that, Your Honor, there's the so-called Plainfield doctrine as articulated in the United States Supreme Court case of *Minnesota versus Dickerson* that contraband discovered during a lawful

Terry-stop is admissible so long as the search does not exceed the bounds permitted by *Terry*, and there's some language in there that indicates that, you know, if a mass or contour or shape of an object makes the identity immediately apparent, the officer may lawfully seize it.

On the other hand, if an officer has determined that the object is not a weapon and that the shape or size does not indicate it's contraband, then the search must stop. So he [22] certainly wouldn't have been authorized to search him at that point, but instead he proceeds to ask the defendant questions to get him to admit that he apparently had the marijuana on him, and he went from there.

So I would submit that the officer exceeded the authority that he lawfully had under this situation, and I would ask the court to grant the motion.

THE COURT: Well, the court's going to deny the motion. I think that the officer certainly had the right to check the license plate. I don't believe that there's any expectation of privacy or privacy rights with respect to a person's license plate. I think a law enforcement officer can check a license plate for any reason whatsoever whenever he feels so advised.

Having checked the license plate, and, again, I don't think it makes any difference whether it was done randomly or whether it was done because he thought this was the vehicle which had acted suspiciously, he had a right to check it. He then checked it and found that it was operating on the wrong license plates, which in itself is an offense.

He says he was going to stop the vehicle, which certainly would have been a lawful stop, but the defendant

voluntarily stopped, so he proceeded to ask the usual questions that you would ask in a stop, and then he asked for his own protection. Having arrived at the point where the vehicle had [23] illegal tags, then the officer's got to make a decision as to what's going to happen to the vehicle. The vehicle – is he going to tell the defendant to drive away with illegal tags on it or what?

So he arrives at that point, and I think he certainly had a right to make inquiry and to pat the defendant down for his own safety. And when he found the bulge, when he patted him down – and I might say that he consented to the patdown. There's no dispute in the evidence. He didn't say no. He consented to being patted down, so he was patted down. And he found a bulge. He didn't search the man. He didn't seize the object at that point. He said, "Do you have any narcotics?" The man said, "Yes." He said, "Can I have them?" And he handed them to him.

I don't think that there was ever an arrest until after the narcotics were handed to the officer. I think everything that happened between the time of the stop and the time that he was arrested were natural and probable results of his lawful stop of the defendant. Well, what was equivalent to a lawful stop, so I see no reason to suppress the drugs that were voluntarily handed over to him at that point.

And then after that, after the arrest, the officer certainly had the right to search the car for an inventory search as well as a search incident to arrest. I think once he was arrested, he had the right to search at least the passenger [24] compartment of the car based on the arrest. And I think he also had the right to make an inventory search of the car because the car had to be towed away. Or

it certainly wasn't going to be driven away by the defendant.

And as far as the statement is concerned, again, there's no conflict in the evidence that the statement was unsolicited. He was under arrest at that point, and there's no evidence that the officer said, "Where did you get the drugs?" Instead, the defendant just volunteered the fact that he acquired the drugs by robbing someone. Again, that was not the result of any interrogation or anything other than a voluntary statement on the part of the defendant. So I see no reason to suppress that evidence either.

So the court is going to overrule the motion with respect to the narcotics that were seized, with respect to the weapon, and also with respect to the statement.

All right. The marshals may take charge of the defendant.

MR. DALTON: Your Honor, he's –

THE COURT: He's not in custody?

MR. DALTON: No, sir. He's been released on –

THE COURT: Oh, I'm sorry. I assumed he was in custody. He's on bond?

MR. DALTON: Yes, sir.

THE COURT: Okay. Well, then, he won't be taken into [25] custody at this point.

All right.

(Hearing concluded at 11:33 a.m.)

C-E-R-T-I-F-I-C-A-T-E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

This 15th day of February, 2002.

/s/ Diane Gray
Diane Mason Gray,
RPR, CRR, CVR

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

UNITED STATES OF AMERICA,

v. **CRIMINAL NO: 2:01CR235**

MARCUS THORNTON,

DEFENDANT

OPINION AND ORDER

(Filed Jan. 28, 2002)

This matter comes before the Court on Defendant Marcus Thornton's motion to suppress any and all evidence accumulated after a July 21, 2001 encounter he had with a Norfolk police officer, which resulted in his arrest on narcotics and firearms charges. Following a hearing on January 24, 2002, the Court **DENIED** the Defendant's motion to suppress. This opinion further sets out the reasoning for the Court's decision.

FACTUAL BACKGROUND

On July 21, 2001, Norfolk Police Officer D.L. Nichols observed a gold vehicle on Sewell's Point Road that was hesitant to pull next to his unmarked police cruiser. Thinking the driver of the gold vehicle suspected he was a police officer, Nichols felt the behavior of the gold vehicle's driver was suspicious. After maneuvering to get behind a gold vehicle he thought to be the one he observed earlier, Officer Nichols ran a check on the license plates of a gold

Lincoln Town Car.[1] The check of the tags found they belonged on a 1982 two-door Chevrolet – not a Lincoln Town Car.

In an unmarked police car with no lights flashing or siren ringing, Nichols began to follow the automobile. The car pulled into a shopping center parking lot, and Nichols continued to follow. After parking, the driver, later identified as Marcus Thornton, stepped out of the automobile and proceeded toward the shopping center. Thornton was the lone occupant of the gold vehicle.

Officer Nichols pulled into the same parking lot, stepped out of his automobile, and approached Thornton. As the defense points out in its motion to suppress, the officer in no way indicated a show of law enforcement authority when he approached Thornton, Mot. to Supp. at 1, although he was in uniform. Nichols asked Thornton for his driver's license and registration. He then informed Thornton that the plates did not belong on the gold Lincoln. After that point, the officer felt that Thornton appeared more nervous than normal for an individual he stops.

Officer Nichols asked Thornton if he had any guns or narcotics on him. Thornton indicated that he did not. Officer Nichols asked the Defendant if he would mind a pat-down search, and Thornton consented. Feeling a bulge, he asked Thornton if the bulge was narcotics. The Defendant replied that he had some "weed" on him. The police officer asked the Defendant for the contraband, and

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[1] Nichols is now unsure whether the gold Lincoln Town Car he managed to get behind was the one that first aroused his suspicion.

Thornton handed the officer two plastic bags, one that appeared to contain marijuana, the other containing a substance consistent with the general appearance of crack cocaine.

The officer then informed Thornton that he was under arrest. The Defendant was placed in the back of the police cruiser, while the officer went to search the automobile incident to the arrest of Thornton. A 9mm semi-automatic weapon was found under the driver's seat of the gold Lincoln Town Car. While on the way to the station, Thornton, unsolicited by Officer Nichols, said the drugs were not his, but instead belonged to an individual he had just robbed.

THE MOTION TO SUPPRESS

The Defendant argues that the officer's stop of him at the shopping center was an illegal seizure when the conversation was expanded beyond what was necessary to investigate the traffic stop. The defense further believes that the [sic] Thornton should have been read his Miranda warnings before he was questioned about weapons and narcotics.

a. The License Plate Check

While they do not belabor the point, both in their brief and during the hearing the defense questioned the basis for the officer to check the license plates on the gold Lincoln Town Car. The case law is clear on this point, one does not have a reasonable expectation of privacy in their vehicle's license plates. *United States v. George*, 971 F.2d 1113 (4th Cir. 1992) ("[O]ne does not have a reasonable expectation of privacy in the visible exterior parts of an

automobile that travels the public roads and highways."); *see also, e.g., Katz v. United States*, 389 U.S. 347 (1967) (holding that "[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection"); *New York v. Class*, 475 U.S. 106 (1986) (holding that there is no reasonable expectation of privacy in a vehicle identification number); *United States v. Hensel*, 699 F.2d 18 (1st Cir[.] 1983) (holding that viewing a license plate on a parked car was not a search for Fourth Amendment purposes). A police officer who views a license plate attached to a vehicle in plain view of the public has every right to run a check on it in furtherance of their law enforcement duties, whether it be done randomly or for a specific purpose. *See generally Id.* [sic]

b. The Terry Stop Was Properly Conducted

The rules governing Nichols' encounter with Thornton were laid down by the Supreme Court in *Terry v. Ohio*, 392 U.S. 1 (1968). An officer must first have *reasonable suspicion* that criminal activity is afoot before a Terry stop can be conducted. *Terry v. Ohio, supra.* After he discovered the vehicle was improperly tagged, Nichols' [sic] has [sic] the requisite level of suspicion to approach the Defendant.

When reasonable suspicion exists to warrant a Terry stop, an officer is entitled to conduct a frisk and limited search for weapons if he reasonably believes that his safety, or someone in proximity, is in danger. *United States v. Baker*, 78 F.3d 135 (4th Cir. 1996). For a more invasive search, normally a warrant or probable cause is constitutionally necessary. *See, e.g., Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). It is well settled, however, that *voluntarily consenting* to a search is an exception to the

above constitutional requirements. *U.S. v. Boone*, 245 F.3d 352 (4th Cir. 2001); *see also Id.* [sic]

Given that the Defendant voluntarily consented to the pat-down search, he may not claim that it was done in violation of his constitutional rights. Even had he not consented to the pat-down search, Officer Nichols' [sic] was well within his rights to conduct it. Accordingly, the Court **FINDS** that the pat-down search was based upon voluntary consent, and therefore not a violation of Thornton's rights.

c. The Defendant's Right to Miranda[2] Warnings Had yet to Attach

One's right to *Miranda* warnings only attaches when one is facing *custodial* interrogation. When a law enforcement officer is merely having a non-custodial conversation with an individual, *Miranda* Rights have yet to attach. *See, e.g.*[,] *Stansbury v. California*, 511 U.S. 318 (1994). Using a totality of the circumstances test, "the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." *Id.* at 323. "The ultimate inquiry is simply whether there [was] a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *Id.*

Beyond wearing a uniform, the officer displayed no outward indicia of police authority that could objectively be viewed as having converted the Terry stop into a

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

custodial situation. Moreover, he and the Defendant were in the midst of a non-custodial conversation in the middle of a shopping center parking lot, not at the station house behind locked doors – further separating this from the normal formalities of a custodial interrogation.

During the non-custodial conversation, the officer asked Thornton whether he had any weapons or narcotics on his person. As stated above, Thornton replied no, then *consented* to a pat-down search. When asked about the bulge felt by the officer, the Defendant *voluntarily* handed over contraband. The officer asked if the bulge was drugs, and the Defendant admitted it was and then, when requested, voluntarily handed him narcotics. The Court **FINDS** that the objective circumstances of this encounter did not create a restraint on freedom of movement of the degree associated with a formal arrest, and the necessity to administer a *Miranda* warning to the Defendant had not been triggered until Thornton's formal arrest.

d. The Search of the Gold Lincoln Town Car

"[W]hen a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *New York v. Belton*, 453 U.S. 454, 460 (1981). After the Defendant voluntarily handed the narcotics to the police officer, probable cause existed and Nichols' arrest of Thornton was lawful. After the lawful arrest took place, a search of the automobile incident to that arrest was not a violation of Thornton's constitutional rights.

Furthermore, since the vehicle could not be driven due to its improper tags, it was to be impounded. The routine,

and well-established, practice of securing and inventorying contents of impounded automobiles "developed in response to three distinct needs: the protection of the owner's property while it remained in police custody, protection of the police against claims or disputes over lost or stolen property and protection of the police from potential danger." *South Dakota v. Opperman*, 96 S.Ct. 3092, 3097 (1976). Therefore, the Court **FINDS** that the search of the gold Lincoln Town Car, which produced the 9mm semi-automatic weapon, was proper under the circumstances.

e. The Inculpatory Statement in the Police Car

As the *Miranda* Court made clear in its ruling, "Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." *Miranda*[,] 384 U.S. at 478. Interrogation has since been defined as involving "express questioning or its functional equivalent." *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980). When Thornton made the statement about stealing the drugs from another individual, it was not in response to any manner of express questioning or its functional equivalent. The Court **FINDS** the statement was made freely and voluntarily, and therefore is available for use by the government.

CONCLUSION

For the above state [sic] reasons, the Court **DENIES** the Defendant's motion to suppress any and all evidence seized as the result of the July 21, 2001 encounter he had with Officer Nichols.

The Clerk is **REQUESTED** to send a copy of this order to all counsel of record.

It is so **ORDERED**.

/s/ Henry Coke Morgan, Jr.
HENRY COKE MORGAN, JR.
UNITED STATES
DISTRICT JUDGE

Norfolk, Virginia
January 28, 2002

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

UNITED STATES OF AMERICA	)	CRIMINAL ACTION
	)	
v.	)	NO. 2:01cr235
	)	
MARCUS THORNTON,	)	
	)	
Defendant.	)	

TRANSCRIPT OF PROCEEDINGS

Norfolk, Virginia

February 7, 2002

(FIRST DAY OF JURY TRIAL)

Before: THE HONORABLE REBECCA BEACH SMITH
United States District Judge

Appearances:

LAURA M. EVERHART
Assistant United States Attorney
Counsel for the United States

WALTER B. DALTON
Counsel for the Defendant

[19] * * *

THE COURT: Ms. Everhart, call your first witness.

I do direct that the witnesses be separated, and I will leave it up to the attorneys to be sure that one of their witnesses isn't in court while the others testify.

MS. EVERHART: Yes, ma'am. Our first witness will be officer D L. Nichols.

(Mr. Nichols was sworn.)

D. L. NICHOLS, DIRECT EXAMINATION on behalf of the government, as follows:

DIRECT EXAMINATION

BY MS. EVERHART:

[20] Q. Would you state your name, please, sir, and tell us where you are employed.

A. Officer Deion L. Nichols, Norfolk Police Department.

Q. Were you so employed on July 21 of last year?

A. Yes, I was.

Q. On that date did you have occasion to have an encounter with the defendant, Marcus Thornton?

A. Yes, I did.

Q. Is this him seated next to Mr. Dalton at the table?

A. That's correct.

Q. Could tell us how Mr. Thornton first came to your attention?

A. I was traveling –

THE COURT: Can you speak up, Officer Nichols, a little bit?

Is his microphone on? I want to be sure the jury can hear him.

Go ahead.

THE WITNESS: I was traveling northbound on Sewells Point Road. I had come to a stoplight, and I was looking in my rear and sideview mirrors, and I noticed a gold car coming up to my left. I couldn't make out the exact model and make at the time. But anyway, as the car was approaching me, it got maybe two car lengths behind me to my left side, and it had just stopped. It was plenty of space for it to [21] pull up next to me. I kind of wondered why the car did that.

THE COURT: So it did not pull up next to you?

THE WITNESS: It did not pull up next to me. I was kind of curious as to why it did that.

So I waited, and the car never pulled up. So when the light turned green, I took off at a very slow pace, and the car continued to drive even slower, never approached me or come up to my side. And I thought that was odd. I was in an unmarked vehicle at the time in my police uniform. I thought maybe the guy probably had seen my patch on my shirt and didn't want to come up to me for whatever reason.

So I continued to creep at a very slow pace, and the car continued to creep at an even slower pace, and this really piqued my interest as to why this person wouldn't pull up to the side of me. There was a side street to the right. I pulled my car in there and turned around, and I pulled up to the stop sign and waited for the car to pass.

A gold Lincoln Town Car that was driven by the defendant, Mr. Thornton, came past. I pulled in behind that vehicle. I ran the tags on the vehicle, which was YHW 3564, on the gold Lincoln Town Car, and that tag came back to a 1982 Chevy two-door. And I thought, well, there is a problem right there, automatically.

BY MS. EVERHART:

Q. And that car was registered to Marcus Thornton?

[22] A. I can't recall who the car was registered to. I know it came back to a 1982 Chevy two-door.

Q. I would ask you to look at government exhibit 3.

A. It says Marcus Thornton.

Q. So it came back to a 1982 Chevy in the name of Marcus Thornton?

A. Yes.

Q. Of Nevada Avenue, I believe?

A. That's what it says here.

MS. EVERHART: Your Honor, at this time I would move for admission of government exhibit 3.

THE COURT: It is admitted.

(Government exhibit 3, admitted.)

BY MS. EVERHART:

Q. Now, after you ran the tags and found that they belonged to a car other than the car they were attached to, what did you do?

A. Mr. Thornton – he pulled into a parking lot in the 7600 block of Sewells Point Road. I pulled in right behind him. As he exited his vehicle, I also exited my vehicle.

I approached him, asked him for his driver's license, and I told him immediately that the car – that the tags on this vehicle didn't come back to this car. He was sweating and appeared nervous right away. He began to speak in a real rapid manner, stating that someone had just given [23] him the car. He was just very nervous and jittery. I asked him to calm down. I asked him why was he so nervous, and he said for no reason.

For officer's safety, because he was acting so jumpy and everything, I asked him for consent and received consent to pat him down for weapons for my safety. While I was patting him down, I felt a large bulge in his left front pocket. I wasn't sure what it was. So after my pat-down, I asked him if he had any narcotics on him. He hung his head and said, yes, I have a bag of weed on me. I asked if I could have it. He reached into his left front pocket and pulled out two large individual bags, one containing three bags of a green, leafy material consistent with marijuana, and the other bag was a large amount of off-white like rock substance consistent with crack cocaine. He handed that to me.

I told him he was under arrest, placed him in handcuffs. I took him and put him in the back of my unmarked car, and I went to do an inventory search on his car, and I located a nine millimeter Bryco handgun under the front driver's seat. He was the sole occupant of the car at that time.

Q. Backing up a little bit, prior to asking if you could have permission to do a pat-down search of the defendant,

did you ask him about whether he had any guns on his person or in the car?

[24] A. Yes, I asked him if he had any guns, and he said, no, he didn't. I asked him was any weapons, any guns in the car. He said not that he knew of.

Q. When you say an inventory search, were you going to permit that car to remain at that location with tags on it that did not belong to the car?

A. No, I wasn't.

Q. So it was to be towed?

A. Yes.

Q. Is it standard operating procedure to inventory the contents of a vehicle for both the owner's protection as well as for your protection against possible claims of missing property?

A. Yes, it is.

Q. Now, I'm going to show you what has been marked as exhibit number 1-A and also what has been marked as exhibit number 2, and ask if you can identify the drugs and the gun that you recovered that day.

A. Yes, ma'am.

Q. Now, was that gun loaded at the time that you found it?

A. Yes, it was.

MS. EVERHART: Your Honor, at this time I would move for admission of government exhibits 1-A and number 2.

THE COURT: All right. 1-A and 2 are admitted.

(Government exhibits 1-A and 2, admitted.)

[25] BY MS. EVERHART:

Q. Now, could you tell us what you did with the drugs and what you did with the gun.

A. I kept both of them in my sole possession. I contacted Narcotics Investigator Davis. I advised him of what I had. He told me to bring Mr. Thornton down. I called for a transport unit to take him down to (unintelligible) –

THE REPORTER: Wait a minute. I can't understand you.

THE COURT: This is not our normal courtroom we are in. That's why we keep asking. The court reporter and I are usually in another courtroom.

THE WITNESS: I had another marked police unit come by to transport Mr. Davis down to the police operations center on Virginia Beach Boulevard.

BY MS. EVERHART:

Q. Mr. Davis, or Mr. Thornton?

A. I'm sorry. Mr. Thornton. I'm sorry. He was going to meet with Investigator Davis.

I kept the narcotics and the weapons in my possession. I also went down to the police operations center, where I turned both of those items over to Investigator Davis, the narcotics and the weapon.

Q. Now, while the defendant was in your presence, did he make any spontaneous statement?

[26] A. Yes. Without any prompting from me, he stated that he had just robbed some cat out at Ocean View. That's how he came about having the narcotics.

Q. Just robbed some cat, meaning man or person?

A. Yeah.

MS. EVERHART: That's all the questions I have. Please answer any questions Mr. Dalton or the court may have.

BY MS. EVERHART:

Q. Oh, one other thing, excuse me. You mentioned the POC. What is the POC?

A. It is where the detective bureau is.

MS. EVERHART: Thank you very much.

THE COURT: It is what, now?

THE WITNESS: It is where the detective bureau is. It's the first precinct, but the detective bureau is there also.

THE COURT: Okay.

CROSS-EXAMINATION

BY MR. DALTON:

Q. Officer Nichols, how long have you been with the Norfolk Police Department?

A. A little over three years now.

Q. What are your normal duties with the Norfolk Police Department?

A. I'm with Metro TAC Special Enforcement Division. We do [27] everything. We have full range over the whole city. On that day I was just on general patrol.

Q. And you indicated that the reason that you ran the license plate was that you suspected the car that Mr. Thornton was driving was the same car that had pulled up at the light and didn't seem to want to pull up next to you; is that correct?

A. Yes.

Q. Are you sure whether it was the same car or a different car, or do you know?

A. I think it probably was a different car. But I ran the tag anyway, and when it came back to a different vehicle, I followed the car till it pulled into the parking lot and stopped. That's when I got out and approached him as he exited his vehicle.

Q. When the license plate didn't match the vehicle, did you suspect it was a stolen car or something of that nature?

A. I didn't really know what to expect at that time. I just know that the tags didn't belong on that vehicle, so I approached, asked him for his driver's license, and he was nervous again right off the bat.

Q. But this was after he had parked his car and gotten out of it and was walking away, is that correct, when you approached him?

A. He had gotten out of his car. He was exiting the car. I [28] didn't know where he was going, but he was

walking away from the car. I approached him, said, can I see your driver's license. I was in full uniform at the time.

Q. Were you in a marked or an unmarked –

A. Unmarked car, yes.

Q. When you asked him for his driver's license, did he give it to you?

A. He gave me some kind of ID. I can't recall right now whether or not it was an ID or a driver's license.

Q. Did you keep his license at that point while you were talking to him?

A. I believe I did.

Q. Did you ever at any time advise him of his legal rights about whether or not he might be obligated to talk to you?

A. Not at that time, I don't think so.

Q. Did you ever do it?

A. I believe I advised him of his rights after he was under arrest.

Q. Now, when you approached him and asked for his driver's license, did you do anything to check on the vehicle, such as run the VIN, the vehicle identification number, to see if it was reported as stolen or anything of that nature?

A. At that time, because of his behavior, I didn't want turn [to] my back on him or turn away from him. I didn't know if he had any weapons on him at that time, so I focused on him. And his [29] behavior seemed odd to me

at the time, so I didn't want to turn away from him and focus my attention on something else, because he was acting so nervous and everything. I had not patted him down at that point, so I wasn't going to turn my back on him.

Q. You said he appeared to be nervous. Was there anything else about his behavior that struck you as odd?

A. He was sweating. His eyes were darting back and forth.

Q. This was in July; isn't that correct?

A. Yes, it was.

Q. It was during the day?

A. Yes, it was.

Q. It was warm outside?

A. I don't recall. I think it probably was.

Q. And after you patted him down, you said you felt this bulge in his pocket. Do you remember which pocket it was in?

A. Left front pocket.

Q. And what did it feel like?

A. It just felt like a squishy type of material. I didn't know exactly what it was. It could have been anything. After I finished patting him down, I asked if he had any narcotics on him. At that point he lowered his head and said he had a bag of weed on him.

Q. Backing up, when you first felt the bulge, can you describe it? How big was it?

[30] A. I can't recall. It was a nice-size bulge.

Q. Was it, say, as big as a golf ball?

A. I can't recall. It just a nice-size bulge in his pocket.

Q. But it was small enough to fit into his pants pocket, whatever was in there?

A. It was in his left front pocket.

Q. When you asked him, then – well, you were pretty confident at that point it wasn't a weapon, weren't you?

A. Yes, I was.

Q. Okay. So you asked him then if he had any narcotics on him?

A. Yes, I did.

Q. That's when he gave his response about having a bag of weed, or something to that effect?

A. He lowered his head and said, I got a bag of weed on me. I asked, may I have it? He reached in his pocket and pulled it out and gave it to me.

Q. After he handed the contents of his pocket to you, you thought there was suspected narcotics, so you arrested him at that point?

A. Yes, I did.

Q. And you remember or you think that you may have advised him of his legal rights at that point?

A. I advised him after I had arrested him, told him he was under arrest. I advised him of his rights then.

[31] Q. Then you proceeded to search the car?

A. That's correct.

Q. Was anyone else there during this time, or was it just you and Mr. Thornton?

A. Just me and Mr. Thornton. I mean, there were some people walking around, but they had nothing to do with the business that we were conducting.

Q. So you conducted the search by yourself; is that right?

A. Yes, I did.

Q. And did you find anything else in the car that was suspicious or contraband or anything of that nature, or just the handgun under the seat?

A. I found a handgun under the driver's seat in which he was sitting.

Q. At the time that you encountered him and asked for his driver's license and so forth, was he free to leave at that point?

A. Yes. I didn't tell him he had to stay. I was just talking to him. He stood there and engaged in conversation.

Q. So you would have let him go if he had said, well, I don't want to talk to you, I'm leaving?

A. Well, he would have had to address the part about the tags not coming out to that car. We would have to still settle that matter.

Q. Did you charge him with anything having to do with [32] irregularity about the tags?

A. No, I did not. I focused on the more serious offense at that time.

Q. So your attention turned from any irregularity about the license plates to whether or not he had weapons or narcotics on him immediately; isn't that correct?

A. Once he presented me with the narcotics and I found the handgun, I didn't worry about the tags anymore. I just focused on the more serious.

Q. Are you aware of whether or not the firearm was ever submitted to see if it could be checked for fingerprints or any examination of that type?

A. I don't know what the investigators did with that.

Q. So that would have been up to an investigator or someone else, but not you, if that would have happened?

A. I wouldn't have fingerprinted it myself, no.

Q. Do you have your notes with you, Officer Nichols?

A. I have some notes right here.

Q. Have you used your notes to refresh your recollection for your testimony today?

A. Yes, I have.

Q. I believe you actually have three sets of notes, do you not? One is dated July 21?

A. That's correct.

Q. Would you look at your notes dated July 21 and tell me [33] where it says on there anything about this oral statement that you said he made.

A. Excuse me?

Q. Would you look on your notes dated July 21, 2001, and tell me where, if anywhere, on those notes there is any indication about this oral statement that you said Mr. Thornton made after you had arrested him.

A. It is not there.

Q. All right. Could you look at your notes that are dated September 26? Do you have those with you?

A. I have these right here.

Q. That's the ones that at the bottom the date on it is July 26?

A. Yes, it is.

Q. Of 2001?

A. Yes.

Q. That appears, to me at least, to be essentially the same as the notes dated July 21, although there appears to be a little more information near the end about the handgun; is that accurate?

A. Yes.

Q. Now, could you tell me where on those notes is any indication about the oral statement that you said he made?

A. It is not there.

Q. All right. Could you look, then, at your notes dated [34] November 9 of 2001.

A. Okay.

Q. Have you got those?

A. Yes, I do.

Q. Those notes talk about the oral statement, do they not?

A. Yes.

Q. They don't really talk about any other facts about the stop or anything, but they talk about this oral statement that you say he made; is that correct?

A. Correct.

Q. And you made those notes on November 9 of 2001 related to a July 21, 2001, stop?

A. Yes, I did.

Q. Now, the information that you have testified to – did you relate that information to Investigator Davis about the circumstances surrounding the stop and so forth?

A. Yes, I did.

Q. And you also turned over the evidence, you said, to him?

A. Yes, I did.

Q. If you could look at your notes again, please, is there – I'm sorry. Directing your attention to the last sentence you have in your notes for November 9, could you

take a look at those, please? I want to ask you about what you said there.

A. Okay.

[35] Q. I believe you indicate there that you advised Investigator Davis that you had not advised Mr. Thornton of his rights, nor had you asked him any questions; is that what is in your notes?

A. That's what it says here, yes.

Q. And yet you testified earlier, did you not, that you believe you did advise him of his rights after you arrested him?

A. Yes, I did. I testified I believed I had at that time.

MR. DALTON: I don't have any further questions, Your Honor.

MS. EVERHART: Just a couple of questions.

REDIRECT EXAMINATION

BY MS. EVERHART:

Q. Is it customary to read somebody their rights – their Miranda rights, as they are usually called, rather – during a routine traffic stop?

A. No, it is not.

Q. If you don't intend to question a defendant, as you did not in this case, is it routine to read them their rights anyway?

A. No, it's not.

Q. Reading the rights has to do with the admissibility of statements; is that correct?

A. Correct.

[36] Q. And that's when a person is in custody, and they are being asked questions, as opposed to a spontaneous statement made by the defendant?

A. That is absolutely correct.

MS. EVERHART: I have no further questions.

THE COURT: All right.

MR. DALTON: May I just follow-up briefly, Judge?

THE COURT: Very briefly.

RECROSS-EXAMINATION

BY MR. DALTON:

Q. On the point Ms. Everhart was just going over with you, you say that you ordinarily would not advise someone of their rights on a traffic stop; is that correct?

A. Correct.

Q. Yet you testified earlier that once you had asked for Mr. Thornton's driver's license, because of his nervousness, you became suspicious and started asked him about things and patting him down and so forth; isn't that correct?

A. Yes, I did.

Q. And I believe you indicated, although you sort of said that he might have been free to leave, you had his license still, didn't you?

A. Yes, I did.

Q. And you began to question him, did you not?

A. I asked him one question, whether he had any narcotics on [37] him – well, I asked him was any weapons in the car or on him, because of his nervous behavior. Once he said he didn't have any weapons on him or the car, I received the consent to pat him down. That's when I found the bulge. And when I felt the bulge in the pocket, I backed away and just asked him, do you by chance have any narcotics on you? That's when he lowered his head and said, yeah, he had weed on him.

Q. You asked him all of these questions without giving him any of his legal rights; isn't that correct?

THE COURT: Can you all approach the bench, please?

(The following discussion occurred at side bar out of the hearing of the jury:)

THE COURT: Judge Morgan has already ruled on this. Why is this proper in front of a jury to be going through all this? Judge Morgan has ruled his constitutional rights were properly observed. So what's the purpose of all this?

MR. DALTON: Basically, Judge, what I'm trying to do is impeach him. He is all over the place in his testimony as far as what he did when and what he made notes about. I'm not trying to relitigate the issue.

THE COURT: I'm going to instruct the jury that the court has already ruled that no constitutional rights –

MR. DALTON: I'm finished with that line of questioning.

THE COURT: I know, but you have left that [38] impression with the jury. I'm going to tell them that it is only being offered for the purpose of the weight they would put to any statement and for impeachment purposes. I'm going to tell them that, because the court has legally ruled, and I think an inference has been raised that somehow constitutional rights have been violated, and the court has ruled on that.

So I'm going to tell the jury that this matter has come before the court, the court has already ruled on it, and that this testimony is all for the purposes of the weight they would give to any statements and the possible impeachment of a witness.

MR. DALTON: I understand, Your Honor.

(Proceedings resumed in open court as follows:)

THE COURT: Ladies and gentlemen of the jury, let me just clarify the reason that the court let the testimony go forward regarding the giving of rights and so forth.

I would first advise you that United States District Judge Henry Morgan of this court has previously ruled that none of the defendant's constitutional rights were violated in taking any statements from him or in seizing any evidence from him. So there is no issue here that his constitutional rights were violated for you to decide.

The only reason the court has let this testimony go forward is for two purposes. You can still decide the weight

that you want to give to the evidence of any statement or [39] evidence that is seized, in other words, the weight that you accord these matters, the statements that are made, and the evidence seized; and secondly, for any impeachment of a witness as to what happened at the time, what they wrote down, and so forth.

But those are the purposes for which it has gone forward, not because there has been any violation of anybody's constitutional rights in regard to taking statements and in seizing evidence. That has been legally ruled on by the court.

All right, Mr. Dalton, if you have anything further, you can go forward.

MR. DALTON: Nothing further, Your Honor. Thank you.

THE COURT: Ms. Everhart, anything further?

MS. EVERHART: No, Your Honor.

THE COURT: All right. Can I excuse Mr. Nichols?

MS. EVERHART: I would prefer that he remain.

THE COURT: All right.

Mr. Nichols, I'll temporarily excuse you. If you would, please remain outside.

THE WITNESS: Yes, ma'am.

* * *

END OF EXCERPT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

UNITED STATES OF AMERICA

v. ACTION NO. 2:01cr235

MARCUS THORNTON,

Defendant.

ORDER

This matter comes before the court on defendant's motion for a new trial, pursuant to Federal Rule of Criminal Procedure 33. Defendant contends that the firearm introduced into evidence at his trial was obtained pursuant to an illegal search of his car by a Norfolk Police Officer. The court has the discretion to grant defendant's motion "if the interests of justice so require." *Fed. R. Crim. P.* 33.

The issue of whether the officer's search of the defendant's car was proper has already been addressed by Judge Henry Coke Morgan of this court. Following a suppression hearing held on January 24, 2002, Judge Morgan issued an opinion and order on January 28, 2002. In that opinion, Judge Morgan ruled that the search of defendant's car was proper. This court agrees with Judge Morgan's reasoning, and finds the introduction of the firearm at defendant's trial was not improper. Accordingly, defendant's motion for a new trial is DENIED.

The Clerk is DIRECTED to send a copy of this order to defendant and all counsel of record.

IT IS SO ORDERED.

/s/ Rebecca Beach Smith
UNITED STATES
DISTRICT JUDGE

Norfolk, Virginia

February 19, 2002

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MARCUS THORNTON,
Defendant-Appellant.

No. 02-4382

Appeal from the United States District Court
for the Eastern District of Virginia, at Norfolk.
Rebecca Beach Smith, District Judge.
(CR-01-235)

Argued: February 24, 2003

Decided: April 3, 2003

Before WIDENER, WILLIAMS, and MOTZ, Circuit Judges.

Affirmed by published opinion. Judge Motz wrote the opinion, in which Judge Widener and Judge Williams joined.

COUNSEL

ARGUED: Walter Bruce Dalton, Assistant Federal Public Defender, Norfolk, Virginia, for Appellant. Laura Marie Everhart, Assistant United States Attorney, Norfolk, Virginia, for Appellee. **ON BRIEF**: Frank W. Dunham, Jr., Federal Public Defender, Norfolk, Virginia, for Appellant. Paul J. McNulty, United States Attorney, Norfolk, Virginia, for Appellee.

OPINION

DIANA GRIBBON MOTZ, Circuit Judge:

A jury convicted Marcus Thornton of possession with intent to distribute cocaine base and two firearm offenses. On appeal, he challenges only the district court's refusal to suppress a firearm found in his automobile, maintaining that it was not legally obtained pursuant to a "search incident to arrest." For the reasons that follow, we affirm.

I.

At a pretrial suppression hearing, the parties produced the following evidence.

On July 21, 2001, Officer Deion L. Nichols, of the Norfolk, Virginia Police Department, driving in an unmarked police cruiser, observed a gold Lincoln Town Car pull to his left that "wouldn't come all the way up to [him]." Assuming that the driver of the Lincoln suspected that he was a police officer, Officer Nichols pulled over to a side street and made a right turn. After the Lincoln passed him, Officer Nichols ran a check on the tags. The check revealed that the tags had been issued to a 1982 Chevy two-door car rather than a Lincoln Town Car. Officer Nichols followed the Lincoln, intending to pull it over. The Lincoln was driven into a parking lot, however, before Officer Nichols "had a chance to do so." Thornton parked the Lincoln and exited the vehicle. Officer Nichols "pulled in behind him and exited [his] vehicle." Officer Nichols, who was in uniform, then approached Thornton, asked him for his driver's license, and told him that his tags did not match the registered vehicle.

Thornton "appeared nervous" and "right away started rambling," "licking his lips," and "sweating." He told Officer Nichols that "someone had just given him the car." "For officer safety," Officer Nichols asked Thornton if he had any narcotics or weapons on him. Thornton said no. The officer then asked him if there were any weapons or narcotics in the car. Thornton again said no. Officer Nichols, "again for officer safety," patted Thornton down, after asking if he could do so. Officer Nichols felt a "bulge" in Thornton's front left pocket. The officer "didn't know what it was, so [he] just kind of casually asked Thornton, 'Do you have any illegal narcotics on you?'" Thornton said that he had "a bag of weed." Officer Nichols then asked him if he could have the bag. Thornton "reached into his pocket" and "pulled out two individual bags," one containing three bags of a "green leafy material consistent with marijuana" and the other with a "large amount of an off-white rocklike substance consistent with crack cocaine."

At that point, Officer Nichols handcuffed Thornton and advised him that he was under arrest. (At trial, Officer Nichols testified that he immediately thereafter put Thornton in the back of the patrol car.) Then, "[i]ncident to that arrest," the officer searched the vehicle and found a "BryCo .9-millimeter handgun" under the front driver's seat, where he had observed Thornton sitting. On the way to the police station, Thornton told Officer Nichols, "without any provocation," that he had "just robbed some cat out at Ocean View, and that's where he got the dope."

On December 12, 2001, a grand jury charged Thornton with possession with intent to distribute cocaine base, in violation of 21 U.S.C.A. § 841(a)(1) (West 1999), possession of a firearm after having been previously convicted of

a crime punishable by a term of imprisonment exceeding one year, in violation of 18 U.S.C.A. § 922(g)(1) (West 2000), and possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C.A. § 924(c)(1) (West 2000).

Thornton moved to suppress the drugs, his statement, and the firearm on various grounds. After a hearing, the district court denied the motion, finding, *inter alia*, that Officer Nichols lawfully searched Thornton's automobile incident to his arrest and, alternatively, that Officer Nichols could have conducted an inventory search of the automobile.

On February 8, 2002, a jury convicted Thornton on all three counts. Thornton moved for a new trial, again arguing that the automobile search was unlawful. The district court denied the motion based on the earlier suppression ruling. On May 3, 2002, the district court sentenced Thornton to 180 months imprisonment and eight years of supervised release. Thornton appeals, challenging only the district court's refusal to suppress the firearm; he does not challenge the refusal to suppress the drugs or his statement.

II.

In reviewing the district court's denial of a motion to suppress evidence, we review legal conclusions *de novo* and factual findings for clear error. *See United States v. Weaver*, 282 F.3d 302, 309 (4th Cir. 2002).

Thornton's sole contention on appeal is that the search incident to arrest doctrine, as applied to searches of automobiles in *New York v. Belton*, 453 U.S. 454 (1981),

required Officer Nichols to "initiate . . . contact with Thornton, either by actually confronting Thornton, or signaling confrontation with Thornton, while Thornton was still in his vehicle."

A.

It is a well-settled "first principle of Fourth Amendment jurisprudence that the police may not conduct a search unless they first convince a neutral magistrate that there is probable cause to do so." *Belton*, 453 U.S. at 457. In *Chimel v. California*, 395 U.S. 752 (1969), the Court discussed the rationale for and limitations of the "search incident to arrest" exception to that warrant requirement:

> When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area "within his immediate control" – construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.

Chimel, 395 U.S. at 762-63. The Court has often reiterated the "two historical rationales for the 'search incident to arrest' exception: (1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial." *Knowles v. Iowa*, 525 U.S. 113, 116 (1998) (citing, *inter alia*, *United States v. Robinson*, 414 U.S. 218, 234 (1973); *Chimel*, 395 U.S. at 762-63).

The Court in *Belton* applied those rationales to the arrest of an "occupant" of an automobile. *See Belton*, 453 U.S. at 460. In *Belton*, a police officer stopped four men, who had sped past the officer. *Id.* at 455. The officer "gave chase, overtook the speeding vehicle, and ordered its driver to pull it over to the side of the road and stop." *Id.* After examining the driver's license and the vehicle registration, the officer determined that none of the men owned the vehicle. *Id.* During that time, the officer also smelled burnt marijuana and saw, on the floor of the car, an envelope marked "Supergold," which he associated with marijuana. *Id.* at 455-56. Accordingly, the officer directed the men to get out of the car and arrested them for unlawful possession of marijuana. *Id.* at 456. After they exited the vehicle, the officer patted down each of them and "'split them into four separate areas of the Thruway . . . so they would not be in physical touching area of each other.'" *Id.* The officer then searched the passenger compartment; he found Belton's jacket on the back seat, unzipped one of the pockets of the jacket, and found cocaine. *Id.*

The Supreme Court rejected Belton's argument that the search of the passenger compartment of the car exceeded the permissible scope of the search incident to his arrest. The Court began its analysis by observing that for the protection of the Fourth and Fourteenth Amendments

to be realized, courts must fashion a clear set of rules that allow police officers to easily determine in most situations "whether an invasion of privacy is justified in the interest of law enforcement." *Id.* at 458 (internal quotation marks omitted). Thus, the Court reasoned, "[a] single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Id.* (internal quotation marks omitted).

The Court then noted the difficulty courts had experienced in fashioning such a rule in the context of an automobile search incident to an arrest:

> While the *Chimel* case established that a search incident to an arrest may not stray beyond the area within the immediate control of the arrestee, courts have found no workable definition of "the area within the immediate control of the arrestee" when that area arguably includes the interior of an automobile and the arrestee is its recent occupant.

Id. at 460. Because articles within a car's passenger compartment "are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m],'" the *Belton* Court established the "workable rule" that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that

automobile." *Id.* at 460 (quoting *Chimel*, 395 U.S. at 763) (footnotes omitted).[1]

B.

Thornton contends that the *Belton* rule does not govern this case because he was not an "occupant of an automobile" when Officer Nichols confronted him. In support of this contention, Thornton relies primarily on a line of authority from the United States Court of Appeals for the Sixth Circuit. *See, e.g., United States v. Hudgins*, 52 F.3d 115, 119 (6th Cir. 1995); *United States v. Strahan*, 984 F.2d 155, 159 (6th Cir. 1993). In *Hudgins*, the court elaborated on the principle that Thornton urges us to adopt:

> Where the officer initiates contact with the defendant, either by actually confronting the defendant or by signaling confrontation with the defendant, while the defendant is still in the automobile, and the officer subsequently arrests the defendant (regardless of whether the defendant has been removed from or has exited the automobile), a subsequent search of the automobile's passenger compartment falls within the scope of *Belton* and will be upheld as reasonable.
>
> . . . .

[1] Although using "occupant" in stating its holding, the *Belton* Court also, as noted above, referred to a "recent occupant." *See id.* at 460; *id.* at 463 (Brennan, J., dissenting); *see also United States v. Franco*, 981 F.2d 470, 473 (10th Cir. 1992) (citing *Belton* for the proposition that "[i]ncident to an arrest, police officers may search a vehicle of which the arrestee was a recent occupant").

> . . . However, *where the defendant has voluntarily exited the automobile and begun walking away from the automobile before the officer has initiated contact with him, the case does not fit within Belton's bright-line rule*, and a case-by-case analysis of the reasonableness of the search under *Chimel* becomes necessary.

52 F.3d at 119 (emphasis added). *See also Strahan*, 984 F.2d at 156-57, 159 (following this rule and finding that *Belton* did not apply because police *silently* observed the defendant park and exit his automobile and then immediately apprehended him approximately 30 feet away).

This court has not previously addressed the Sixth Circuit's limitation on the *Belton* rule in a published opinion. We note, however, that other courts of appeals have considered the question. Although one court previously embraced a rule consistent with the Sixth Circuit's limitation, *see United States v. Fafowora*, 865 F.2d 360, 362 (D.C. Cir. 1989) (holding that "ambiguity" necessitating *Belton*'s bright-line rule does not apply "where the police come upon the arrestees outside of an automobile"), three others have refused to do so. *See United States v. Sholola*, 124 F.3d 803, 817 (7th Cir. 1997) (holding that defendant who was next to open car door ready to enter it, was " 'positively linked to [car] prior to his arrest' ") (quoting *United States v. Adams*, 26 F.3d 702, 705 (7th Cir. 1994)); *United States v. Snook*, 88 F.3d 605, 606 (8th Cir. 1996) (holding that fact that defendant "had just stepped out of his vehicle as the officer arrived and before his arrest does not alter his status as an 'occupant' of the vehicle"); *United States v. Franco*, 981 F.2d 470, 473 (10th Cir. 1992) (declining to adopt rule, advanced by defendant,

that "unless an arrest was made in the arrestee's automobile, a search of the automobile was not 'incident to the arrest' for the purpose of that exception to the warrant requirement").

State courts have also struggled with this issue. *Compare, e.g., People v. Stehman*, 783 N.E.2d 1, 6 (Ill. 2002) ("[W]e find the . . . analysis of the Sixth Circuit Court of Appeals in [*Hudgins*] persuasive."), *with State v. Wanzek*, 598 N.W.2d 811, 815 (N.D. 1999) ("We are not persuaded by the line of cases which hold an arrestee is an occupant only when arrested inside the vehicle or where the police initiate contact with the arrestee before the arrestee exits the vehicle."); *Glasco v. Commonwealth*, 513 S.E.2d 137, 141-42 (Va. 1999) (same).

Given this division, it is not surprising that the Supreme Court recently granted certiorari on the question of whether *Belton*'s "bright-line" rule "is limited to situations in which the officer initiates contact with the occupant of a vehicle while that person remains inside the vehicle." *Florida v. Thomas*, 532 U.S. 774, 776 (2001). In *Thomas*, Florida's highest court expressly adopted the Sixth Circuit's approach. *See Thomas v. State*, 761 So.2d 1010, 1013 (Fla. 1999) ("We find the recent analysis of the Sixth Circuit Court of Appeals in [*Hudgins*] persuasive."). After full briefing and oral argument, however, the Supreme Court dismissed the case for want of jurisdiction. *See Thomas*, 532 U.S. at 781.

After carefully considering the question and the conflicting authority, we join those courts that have rejected the limitation of *Belton* to situations in which "the officer initiates contact with the defendant, either by

actually confronting the defendant or by signaling confrontation with the defendant, while the defendant is still in the automobile." *Hudgins*, 52 F.3d at 119. We do so for a number of reasons.

First, the Supreme Court has clearly indicated, albeit in dicta, that an officer may search an automobile incident to an arrest, even if the officer has not initiated contact while the arrestee was still in the automobile. In *Michigan v. Long*, 463 U.S. 1032 (1983), officers on patrol in a rural area observed a speeding car turn down a road and swerve into a shallow ditch. *Id.* at 1035. When the officers arrived at the scene, they met Long, the sole occupant of the vehicle, "at the rear of the car, which was protruding from the ditch onto the road," with the driver's side door open. *Id.* at 1035-36. Although affirming a subsequent search of the car's passenger compartment as a protective one under *Terry v. Ohio*, 392 U.S. 1 (1968), the Court noted at the outset that "[i]t is clear, and the respondent concedes, that if the officers had arrested Long . . . they could have searched the passenger compartment [under *Belton*]." *Id.* at 1035 n.1. The Court further explained:

> We stress that our decision does not mean that the police may conduct automobile searches *whenever* they conduct an investigative stop, although the "bright line" that we drew in *Belton* clearly authorizes such a search whenever officers effect a custodial arrest. An additional interest exists in the arrest context, *i.e.*, preservation of evidence, and this justifies an "automatic" search.

Id. at 1049 n.14 (emphasis in original); *see also Thomas*, 532 U.S. at 776 (emphasizing the "bright-line" nature of the *Belton* rule).

Further, the historical rationales for the search incident to arrest doctrine – "the need to disarm the suspect in order to take him into custody" and "the need to preserve evidence for later use at trial" – do not permit the limitation on the *Belton* rule that the Sixth Circuit has adopted and Thornton espouses. *Knowles*, 525 U.S. at 116. "'[D]anger to an officer'" from an arrest and the "need to discover and preserve evidence" continue to be concerns regardless of whether the arrestee exits the automobile voluntarily or because of confrontation with an officer. *Id.* at 117-18 (quoting *Robinson*, 414 U.S. at 234-35). Neither the Sixth Circuit nor Thornton suggest otherwise.

Indeed, we believe that Thornton's proposed limitation of the *Belton* rule would raise serious safety concerns for law enforcement personnel. A rule that requires officers to actually confront or signal confrontation with an arrestee while the arrestee is in the automobile, in order to justify a search of the automobile incident to arrest, could very well endanger an officer. For instance, we can certainly imagine the hesitancy of an officer to activate his lights and sirens if the officer encounters the arrestee while conducting undercover surveillance in an area. Moreover, when encountering a dangerous suspect, it may often be much safer for officers to wait until the suspect has exited a vehicle before signaling their presence, thereby depriving the suspect of any weapons he may have in his vehicle, the protective cover of the vehicle, and the possibility of using the vehicle itself as either a weapon or a means of flight. Mandating that officers alert a suspect to their presence before he sheds the protective confines of his vehicle would force officers to choose between forfeiting the opportunity to preserve evidence for later use at trial and increasing the risk to their own lives and the lives of others. We

decline to require officers to make this choice. *See Wanzek*, 598 N.W.2d at 815 (The cases adopting the proposed limitation "raise grave public policy issues because they create serious concerns for the safety of officers and others."); *Thomas*, 761 So.2d at 1014-15 (Wells, J., dissenting) ("The reason for this bright-line rule is officer safety, which is equally as much a concern whether the officer initiates the contact, actually confronts the person, or the person voluntarily exits the vehicle as long as the connection with the vehicle is proximate to the arrest."); *Stehman*, 783 N.E.2d at 11 (Thomas, J., dissenting) ("[W]hether the defendant exits voluntarily or involuntarily, there is always a danger to the officer associated with the subsequent arrest and the proximity of the vehicle.").

Additionally, the limitation on the *Belton* rule that Thornton urges could "encourage individuals to avoid lawful searches of their vehicles by rapidly exiting or moving away from the vehicle as officers approached." *Wanzek*, 598 N.W.2d at 815. Surely, "[p]olice officers should not have to race from their vehicles to the arrestee's vehicle to prevent the arrestee from getting out of the vehicle in order to conduct a valid search." *Id.*

Nonetheless, we recognize the concerns of those courts that have attempted to limit the scope of *Belton* to situations in which officers have initiated contact with arrestees while still in the automobile. The *Belton* rule cannot be stretched so as to render it limitless by permitting officers to search any vehicle from which an arrestee has emerged, regardless of how much time has elapsed since his exit or how far he is from the vehicle when arrested.

In the case at hand, however, we note that Thornton concedes that he was in close proximity to his vehicle

when Officer Nichols approached him. His concession is well-taken. Although the record is not clear as to the precise distance between Thornton and his automobile when Officer Nichols confronted him, the record does conclusively show that Officer Nichols observed Thornton park and exit his automobile and then approached Thornton *within moments.*

Thus, "no doubt exists that the car was within [Thornton's] immediate control at the beginning of his encounter with" Officer Nichols. *See United States v. Johnson*, 114 F.3d 435, 440 (4th Cir. 1997) (so noting in case involving question of unreasonable delay between arrest and search of car). Stated differently, Thornton "was 'positively linked' to the searched vehicle prior to his arrest." *Sholola*, 124 F.3d at 817 (quoting *Adams*, 26 F.3d at 705); *id.* at 823 (Wood, J., concurring) ("The 'positive link' required must, in keeping with *Belton*, be one that requires physical proximity that is the equivalent of occupancy of the automobile."); *see also Franco*, 981 F.2d at 473 (affirming validity of search under *Belton* because defendant "was a recent occupant of his vehicle[,]" "the arrest was made in close proximity to his vehicle[,]" and "[d]uring the illegal transaction [defendant] exercised control over his vehicle and its contents"). The conceded close proximity, both temporally and spatially, of Thornton and his car at the time of his arrest provides adequate assurance that application of the *Belton* rule to cases like this one does not render that rule limitless.[2] Accordingly, we hold that

[2] We also note that circuit precedent, which Thornton does not challenge, permitted Officer Nichols to separate Thornton from the vehicle (in this case by handcuffing him and placing him in the patrol

(Continued on following page)

Officer Nichols lawfully searched Thornton's automobile incident to the arrest. Because we affirm on this ground, we decline to reach the district court's alternative holding that Officer Nichols could have conducted a lawful inventory search.

III.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

car) prior to the search. *See United States v. Milton*, 52 F.3d 78, 80 (4th Cir. 1995) (holding that *Belton* "applies even if the arrestee has been separated from [the vehicle] prior to the search of the passenger compartment" (internal quotation marks omitted)); *see also* 3 Wayne R. LaFave, *Search & Seizure* § 7.1(c), at 448-49 (3d ed. 1996 & Supp. 2003) ("[U]nder *Belton* a search of the vehicle is allowed even after the defendant was removed from it, handcuffed, and placed in the squad car, or even if a single defendant was in the custody of several officers.") (footnotes omitted).

JUDGMENT

FILED: April 3, 2003

UNITED STATES COURT OF APPEALS

for the

Fourth Circuit

NO. 02-4382
CR-01-235

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

MARCUS THORNTON

Defendant-Appellant

Appeal from the United States District Court for the Eastern District of Virginia at Norfolk

---

In accordance with the written opinion of this Court filed this day, the Court affirms the judgment of the District Court.

Patricia S. Connor
/s/ Patricia S. Connor
CLERK

(ORDER LIST: 540 U.S.)

MONDAY, NOVEMBER 3, 2003

* * *

CERTIORARI GRANTED

* * *

03-5165 THORNTON, MARCUS V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted.

* * *

Supreme Court, U.S.
FILED
DEC 18 2003
OFFICE OF THE CLERK

No. 03-5165

In The Supreme Court of the United States

MARCUS THORNTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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QUESTION PRESENTED

Whether *New York v. Belton*, 453 U.S. 454 (1981), which established a bright-line rule authorizing a search of a car's passenger compartment incident to the contemporaneous lawful arrest of an occupant therein, also authorizes a warrantless search of a car when the arrestee was not in the car when the police initiated contact with him or within reaching distance of the car at the time of his arrest?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit appears in the Joint Appendix at pages 61-75, and is reported at 325 F.3d 189 (4th Cir. 2003). The rulings of the district court appear in the Joint Appendix at pages 30-37 and 59-60, and are unpublished.

JURISDICTION

The United States District Court for the Eastern District of Virginia had jurisdiction over this criminal case pursuant to 18 U.S.C. § 3231. The United States Court of Appeals for the Fourth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291. That court decided this case on April 3, 2003. J.A. 61, 76. Mr. Thornton filed his petition for writ of certiorari on July 1, 2003, which this Court granted on November 3, 2003. J.A. 77. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fourth Amendment to the United States Constitution, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation,

and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

STATEMENT OF THE CASE

A. Material Facts

Late one morning in July 2001, Officer Deion L. Nichols was driving on Sewells Point Road, in Norfolk, Virginia, in an unmarked police car. While stopped at a traffic light, the officer noticed a driver in a gold-colored car who would not pull up next to his car. Finding this behavior suspicious, the officer pulled into a side street and turned around so that he could get behind the driver. J.A. 8-10, 12-13, 18, 30-31, 40.

After Nichols had turned around, he observed Petitioner Marcus Thornton's car – a gold Lincoln Town Car – drive past on Sewells Point Road. Mr. Thornton's car was not the car Nichols initially observed, and the officer noticed nothing unusual or suspicious about it. Nevertheless, Officer Nichols began to follow Mr. Thornton and "ran the tag anyway." He learned that the license plates were issued for a 1982 Chevrolet that was registered to Mr. Thornton.[1] Nichols continued to follow Mr. Thornton, but never signaled him to stop. J.A. 9-10, 13-14, 16, 30-31, 41, 46.

[1] Although Officer Nichols could not recall at the suppression hearing if he learned that the Chevrolet was registered to Mr. Thornton, the officer acknowledged the car's ownership at trial. J.A. 16-17, 41.

Mr. Thornton turned into the parking lot of a shopping center. He parked, got out of his car, and began to walk toward the stores. In the parking lot, he was intercepted by Officer Nichols, who had also parked and exited his unmarked car. J.A. 9-10, 16, 18, 31, 42, 46-47.

Officer Nichols asked Mr. Thornton to identify himself, and he did so. In response to Nichols' statement that the license plates were registered to another car, Mr. Thornton explained that he had recently acquired the Lincoln. J.A. 10-11, 16, 18, 42, 47. Nichols asked no follow-up questions about the license plates, J.A. 17-18, although under Virginia law, a person may, in specified circumstances, place plates registered to his car temporarily on another.[2]

Instead, Officer Nichols asked Mr. Thornton, who was sweating in the heat of the July day, why he was so nervous. Mr. Thornton replied "for no reason." Nichols then asked whether Mr. Thornton had any narcotics or weapons on him. Mr. Thornton said that he did not. J.A. 11, 18-19, 31, 42, 48.

Officer Nichols then decided he should frisk Mr. Thornton, and received Mr. Thornton's consent to do so. During the pat-down, Nichols felt a bulge of squishy material in Mr. Thornton's left front pants pocket that he could not identify. Nichols could not tell what the bulge was, so he again asked Mr. Thornton if he had any narcotics on him. Mr. Thornton owned up to having a bag of marijuana. Nichols directed

[2] *See Lawrence v. Commonwealth*, 578 S.E.2d 54, 56-57 (Va. Ct. App. 2003) (referencing applicable Virginia Code sections). At the suppression hearing, Officer Nichols could not recall whether he issued Mr. Thornton a summons for the irregularity of the license plates, but later testified at trial that he did not issue a summons. J.A. 17-18, 51.

him to hand it over. Mr. Thornton gave the officer two bags, one containing marijuana, the other containing a substance that appeared to be cocaine base. J.A. 11, 19-21, 31-32, 42, 48.

Nichols arrested Mr. Thornton, handcuffed him, and placed him in the back of the police car. Nichols then walked over to Mr. Thornton's car and searched it. The search, which Nichols described as "incident to that arrest," uncovered a nine-millimeter handgun. J.A. 11, 32, 42. Mr. Thornton was charged in the United States District Court for the Eastern District of Virginia with possession with intent to distribute cocaine base (21 U.S.C. § 841(a)(1)), possession of a firearm by a convicted felon (18 U.S.C. § 922(g)(1)), and possession of a firearm in furtherance of a drug trafficking crime (18 U.S.C. § 924(c)). J.A. 63-64.

B. Proceedings Below

Before trial, Mr. Thornton moved to suppress, *inter alia*, the gun found as a result of the search of his car. J.A. 1-2, 30. With respect to that search, the United States argued only that it was justified as a search incident to Mr. Thornton's arrest and, alternatively, that the gun would have been inevitably discovered during an inventory search of the car. J.A. 22-23; *see also* J.A. 35-36. At the evidentiary hearing, the officer testified to the facts described above. He did not, however, testify to Mr. Thornton's distance from his car when arrested or whether that distance fell within "reaching distance" of the car.

The district court denied Mr. Thornton's motion in its totality, ruling in pertinent part that the officer conducted a valid search of the car previously driven by Mr. Thornton

incident to his arrest, despite the fact that it was clear that Mr. Thornton was not an occupant of the car at the time of that arrest. The court's written ruling on this point, in its entirety, was as follows:

> "[W]hen a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *New York v. Belton*, 453 U.S. 454, 460 (1981). After the Defendant voluntarily handed the narcotics to the police officer, probable cause existed and Nichols' arrest of Thornton was lawful. After the lawful arrest took place, a search of the automobile incident to that arrest was not a violation of Thornton's constitutional rights.

J.A. 35; *see also* J.A. 27-28. Although the district court described in its written opinion the facts leading up to the search of the car, J.A. 30-32, it made no specific findings regarding Mr. Thornton's distance from the car when Officer Nichols arrested him.[3]

At trial, Officer Nichols testified to essentially the same facts. J.A. 39-58. Again, that testimony did not establish Mr. Thornton's distance from his car at the time of arrest, and, more particularly, whether he was within "reaching distance" of it. Following the verdict of guilt on all three counts, Mr. Thornton moved for a new trial based upon the introduction of an illegally-seized firearm into

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[3] The district court also agreed with the United States that the gun would have been discovered during an inventory search following impoundment. J.A. 35-36. Although raised on appeal, the Court of Appeals specifically declined to reach that issue. J.A. 75.

evidence at trial. J.A. 3-4, 59. He argued in part that the search of his car was not permissible incident to his arrest because *New York v. Belton*, 453 U.S. 454 (1981), upon which the district court relied in denying the motion to suppress, did not authorize the car search as Mr. Thornton was not an occupant of the car at the time that Officer Nichols stopped him. J.A. 59; *see also* J.A. 23.

The district court denied the motion for a new trial, agreeing with the previous findings of United States District Judge Henry Coke Morgan that the search was proper. J.A. 59-60, 64. The court subsequently sentenced Mr. Thornton to 180 months of imprisonment and eight years of supervised release. J.A. 4, 64.

Mr. Thornton appealed to the United States Court of Appeals for the Fourth Circuit, challenging only the district court's refusal to suppress the firearm. J.A. 64. In a published opinion, that court affirmed the district court. *United States v. Thornton*, 325 F.3d 189 (4th Cir.), *cert. granted*, 124 S. Ct. 463 (2003); J.A. 61-75. The Court of Appeals determined that Officer Nichols' search of Mr. Thornton's car was proper even though Mr. Thornton was not in his car when Nichols first approached him. 325 F.3d at 196, J.A. 73-75. After reviewing this Court's rulings in *Chimel v. California*, 395 U.S. 752 (1969), and in *Belton*, the Court of Appeals acknowledged the division among the federal and state courts as to whether *Belton* applies in cases in which a defendant is not an occupant of a car at the time that a police officer first approaches him. 325 F.3d at 192-93, 194, J.A. 65-68, 68-70. For several reasons, the court determined that *Belton* authorized a search of a car incident to arrest even when the arrestee has not been approached by the police while still an occupant of the car. 325 F.3d at 194-96, J.A. 70-74.

First, the court found that this Court's decision in *Michigan v. Long*, 463 U.S. 1032 (1983), supports the application of *Belton* in the situation where a defendant is already out of his car when the police first approach him. 325 F.3d at 194-95, J.A. 71. Second, the court maintained that the historical rationales behind the search incident to arrest exception permit a search regardless of a person's motivation for leaving his car. 325 F.3d at 195, J.A. 72. Finally, the court explained that a limitation on *Belton* to "occupants" of a car would create significant safety concerns for police officers because it would require them to confront an arrestee while that person is still in the car in order to take advantage of *Belton*'s exception to the warrant requirement. 325 F.3d at 195-96, J.A. 72-73. The court further suggested that any limitation on *Belton* could encourage occupants of cars to move away from their vehicles in order to avoid lawful searches. 325 F.3d at 196, J.A. 73.

Consequently, the court concluded that the spatial and temporal proximity test used by other courts was sufficient to protect arrestees from limitless applications of *Belton*. 325 F.3d at 196, J.A. 73-74. The court acknowledged that the record did not establish Mr. Thornton's precise distance from his car. 325 F.3d at 196, J.A. 74. Finding, however, that Officer Nichols had approached Mr. Thornton "*within moments*" of when he got out of his car, the Court of Appeals affirmed the district court's ruling that the search of Mr. Thornton's car was conducted incident to his arrest. 325 F.3d at 196, J.A. 74-75 (emphasis in original).

Mr. Thornton timely filed a petition for writ of certiorari. This Court granted the petition. 124 S. Ct. 463, J.A. 77.

SUMMARY OF ARGUMENT

In *Chimel v. California*, 395 U.S. 752 (1969), this Court authorized a warrantless search of the area within an arrestee's immediate control contemporaneously with his arrest. The Court justified such a search on the twin rationales that a police officer must be able to prevent an arrestee (1) from gaining access to weapons that could be used against the officer, and (2) from concealing or destroying evidence. Because an exception to the Fourth Amendment's warrant requirement must be closely tied to the rationales supporting the exception, the Court limited the area of the search to only the area within which an arrestee could reach for a weapon or evidence (hereafter "reaching distance"). In *New York v. Belton*, 453 U.S. 454 (1981), this Court established a bright-line rule as to what parts of a car an officer may search incident to arresting an occupant. The Court emphasized, though, that it was not retreating from the principles it laid out in *Chimel*; that is, the police may search only the area within reaching distance of the arrestee at the time of arrest. Although *Belton* clearly applies to an "occupant" of a car, the decision makes an isolated reference to a "recent occupant." This reference has caused courts to struggle with when *Belton* authorizes an automatic search of a car incident to an arrest that occurs outside the car.

The Court of Appeals acknowledged that the record in Mr. Thornton's case does not establish precisely how far he was from his car when he was arrested. The court also acknowledged that *Belton* is not without limits. Nevertheless, based on *Belton*'s single reference to recent occupants, the Court of Appeals expanded *Belton* to a situation in which a person is not an occupant of a car, but is merely proximately linked to the car, both in terms of time and

distance, although not necessarily within reaching distance of it (hereafter the "proximity approach"). This approach is wrong for several reasons.

First, the proximity approach is not consistent with the reasoning of *Chimel* and *Belton*. By permitting a search of a car when an arrestee is no longer an occupant or within reaching distance of it, the proximity approach becomes untethered from the two exigency rationales justifying the search incident to arrest exception. Nor does this Court's dicta in footnotes in *Michigan v. Long*, 463 U.S. 1032 (1983), authorize such an approach. Second, the proximity approach does not provide a straightforward, workable standard in its application. Courts have not reached any uniform consensus on the limits outside of which a person is no longer a recent occupant of a car. Third, the proximity approach does not further officer safety. If the person is beyond reaching distance of the car when he is arrested, then he is by definition deprived of the access to weapons that put officers in increased danger by virtue of the fact of arrest. In short, the proximity approach comes dangerously close to allowing automatic searches in all instances of custodial arrests made anywhere near a car, thus turning the Fourth Amendment's warrant requirement on its head. Consequently, this Court should reject the proximity approach as a means of determining who is a recent occupant of a car for purposes of applying *Belton*.

Instead of the proximity approach, the Court should adopt a means of determining who is a recent occupant that draws on *Chimel* and *Belton*. Under one alternative, advanced by Mr. Thornton below, *Belton* would apply only to a person who was an occupant of a car at the time the police initiated contact with him, as long as the officer

arrested that person within reaching distance of the car (hereafter the "contact initiation rule"). Although the Court of Appeals rejected the contact initiation rule, it is preferable to the proximity approach for several reasons. First, *Belton* and *Chimel* themselves support this rule, as in both cases it is clear that the police initiated contact with the defendants while they were, respectively, in the car or room to be searched. Second, the contact initiation rule is a simple and straightforward, non-subjective and fact-based rule that will be easy for police officers and courts alike to apply, i.e., was the person in the car at the time the police initiated contact, and did the officer arrest the person within reaching distance of the car? Third, the contact initiation rule does not adversely affect the safety of police officers. If the officer has not initiated contact while the person is in the car, then he can look to a number of other exceptions to the warrant requirement on which to justify his search, but not to *Belton*.

Another alternative for determining who is a recent occupant of a car is a limited version of the Court of Appeals' proximity approach (hereafter the "limited proximity approach"). Specifically, this approach would deem a recent occupant of a car to be a person who, prior to being arrested, has just gotten out of the car but is still within reaching distance of it at the time of arrest. Like the contact initiation rule, this approach finds support in *Belton* itself. The limited proximity approach also is consistent with *Long*, is straightforward and easy to apply, and furthers the two rationales underpinning the search incident to arrest exception.

Regardless of whether the Court chooses the contact initiation rule or the limited proximity approach, the United States has not carried its burden of proving that

the search incident to arrest exception justified the search of Mr. Thornton's car. The United States proved neither that Mr. Thornton was in his car when Officer Nichols approached him, nor that he was within reaching distance of the car when he was arrested.

In sum, *Belton* was never intended to extend *Chimel*, but instead was designed to establish how *Chimel* applies to cars. To extend *Belton*'s reach beyond reaching distance of a car untethers it from *Chimel* and from the rationales that justify what was intended to be a narrowly circumscribed exception to the warrant requirement of the Fourth Amendment.

ARGUMENT

I. THE COURT OF APPEALS ERRED BY ALLOWING A *BELTON* SEARCH WHEN AN ARRESTEE IS MERELY IN PROXIMITY TO HIS CAR

When a police officer places a person under arrest, *Chimel v. California*, 395 U.S. 752 (1969), authorizes the officer to search that arrestee's person and the area within his immediate control contemporaneously with the arrest. *New York v. Belton*, 453 U.S. 454 (1981), applied *Chimel* to the arrests of occupants of cars, authorizing an automatic search of a car conducted contemporaneously with the lawful custodial arrest of an occupant of the car.

In upholding the search of Mr. Thornton's car, the Court of Appeals acknowledged that *Belton* "cannot be stretched so as to render it limitless by permitting officers to search any vehicle from which an arrestee has emerged, regardless of how much time has elapsed since his exit

or how far he is from the vehicle when arrested." 325 F.3d at 196, J.A. 73. The court conceded that the record did not establish precisely how far Mr. Thornton was from his car when Officer Nichols confronted him. 325 F.3d at 196, J.A. 74. The court concluded, however, that the search of Mr. Thornton's car was valid because the officer approached Mr. Thornton "within moments" of when he left his car. 325 F.3d at 196, J.A. 74. The court found that the car was within Mr. Thornton's immediate control because he was "positively linked" to the car just before his arrest and he was in close temporal and spatial proximity to the car when he was arrested. 325 F.3d at 196, J.A. 74.

The Court of Appeals erred in ruling that *Belton* allows a search of a car when an arrestee is merely in proximity to his car (hereafter the "proximity approach"). As an initial matter, this approach is not consistent with this Court's prior decisions. It is not tethered to the exigent circumstances rationale that underpins the search incident to arrest exception, as required by *Chimel*, and by *Belton* itself. Further, the approach has yielded inconsistent results, and it sets no outer limit beyond which a person is no longer a recent occupant. Finally, the approach does not promote officer safety. In short, the proximity approach creates a rule of convenience for the police and eviscerates the protections provided by the Fourth Amendment.

A. The Proximity Approach Departs From This Court's Prior Decisions Regarding Searches Incident to Arrest

1. *Chimel v. California*

This Court set forth the foundation of its modern analysis of the search incident to arrest exception in *Chimel v. California*, 395 U.S. 752 (1969). In that case, Ted Chimel was suspected of burglarizing a coin shop. *Id.* at 753. Three police officers executed an arrest warrant by handing him the warrant when he came into his house after returning from work. *Id.* After Chimel refused to give consent for a search of his house, the officers proceeded – without a search warrant – to search "the entire three-bedroom house, including the attic, the garage, and a small workshop," as well as the contents of drawers, all purportedly incident to the arrest. *Id.* at 754. This Court held that the scope of the search was unreasonable under the Fourth Amendment. *Id.* at 768.

In so holding, the Court explained that the Fourth Amendment requires that "'[t]he scope of [a] search must be strictly tied to and justified by the circumstances which rendered its initiation permissible.'" *Id.* at 762 (quoting *Terry v. Ohio*, 392 U.S. 1, 19 (1968)) (alterations in original). The Court then established two general principles that govern the acceptable scope of a search incident to arrest. First, the Court determined that it is "entirely reasonable" under the Fourth Amendment for police to search an arrestee's person in conjunction with a lawful arrest "in order to remove any weapons that the [arrestee] might seek to use in order to resist arrest or effect his escape," and in order to prevent "concealment or destruction" of evidence. *Id.* at 763. Second, the Court found that "the area into which an arrestee might *reach* in order to

grab a weapon or evidentiary items must, of course, be governed by a like rule." *Id.* (emphasis added); *see also id.* at 766. Thus, *Chimel* defined the area that may be searched incident to arrest, referred to hereafter as "reaching distance."[4] The Court cautioned, however, that "[t]here is no comparable justification . . . for routinely searching any room other than that in which an arrest occurs – or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself." *Id.* at 763. "Such searches, in the absence of well-recognized exceptions," the Court stated, "may be made only under the authority of a search warrant." *Id.*

In rejecting the argument that the search of Chimel's entire house, or even an entire room, was "reasonable," the Court noted that "that argument is founded on little more than a subjective view regarding the acceptability of certain sorts of police conduct, and not on considerations relevant to Fourth Amendment interests." *Id.* at 764-65. "Under such an unconfined analysis," in the Court's view, "Fourth Amendment protection in this area would approach the evaporation point." *Id.* at 765. As the Court warned, "[n]o consideration relevant to the Fourth Amendment suggests any point of rational limitation, once the search is allowed to go beyond the area from which the person arrested might obtain weapons or evidentiary

[4] This area also has been called the "grab area," *see, e.g., United States v. Gwinn*, 219 F.3d 326, 335 (4th Cir.), *cert. denied*, 531 U.S. 1025 (2000); *United States v. Ortiz*, 146 F.3d 25, 28 (1st Cir.), *cert. denied*, 525 U.S. 917 (1998); the "grabbable area," *see, e.g., United States v. Lorenzo*, 867 F.2d 561, 561 (9th Cir. 1989); *State v. Gonzalez*, 487 N.W.2d 567, 569 (Neb. Ct. App. 1992); and "grabbing distance," *see, e.g., United States v. Sholola*, 124 F.3d 803, 817 (7th Cir. 1997).

items." *Id.* at 766 (footnote omitted). Thus, the Court concluded, "[t]he only reasoned distinction is one between a search of the person arrested and the area within his reach on the one hand, and more extensive searches on the other." *Id.*

Only one Term after deciding *Chimel*, in a case analogous to this case, this Court considered whether a search of a house could fall within the search incident to arrest exception when the arrestee had just been in the house but was arrested outside of it. In *Vale v. Louisiana*, 399 U.S. 30 (1970), the Court concluded that neither *Chimel* nor earlier decisions authorized such a search. In *Vale*, three police officers who had warrants for Vale's arrest set up surveillance at his house. *Id.* at 31. After watching Vale come out of his house, approach an occupied car, return to his house, and come back out to the car, the officers concluded that a drug sale had occurred. *Id.* at 32. They drove toward Vale, who, when he saw them, turned around and walked back toward his house. *Id.* As he reached the steps of the house, two of the officers called to Vale, directing him to stop because he was under arrest. *Id.* The officers then searched the house. *Id.* at 33. In rejecting the application of the search incident to arrest exception to these facts, the Court "decline[d] to hold that an arrest on the street can provide its own 'exigent circumstance' so as to justify a warrantless search of the arrestee's house." *Id.* at 35. The Court emphasized that "[i]f a search of a house is to be upheld as incident to an arrest, that arrest must take place *inside* the house," not "two blocks away," "twenty feet away," or even "on the sidewalk near the front steps." *Id.* at 33-34 (emphasis in original) (citations omitted).

2. *New York v. Belton*

In *New York v. Belton*, 453 U.S. 454 (1981), this Court addressed the proper scope of the search incident to arrest exception in the context of the "recurring factual situation" of car searches. *Id.* at 460. Specifically, the Court sought to answer the following question: "When the occupant of an automobile is subjected to a lawful custodial arrest, does the constitutionally permissible scope of a search incident to his arrest include the passenger compartment of the automobile in which he was riding?" *Id.* at 455.

In *Belton*, a single state trooper patrolling on the New York State Thruway pulled over a speeding car that contained four occupants. *Id.* The officer determined that none of the occupants owned the car or was related to the owner. *Id.* During the traffic stop, the officer smelled burnt marijuana and noticed an enveloped marked "Supergold" – which the officer associated with marijuana – on the floor of the car. *Id.* at 455-56. The officer ordered all four men out of the car and placed them under arrest for unlawful possession of marijuana. *Id.* at 456. He then patted down each occupant and "split them up into four separate areas of the Thruway . . . so they would not be in physical touching area of each other." *Id.* (internal quotation marks omitted). After finding marijuana in the "Supergold" envelope, the officer issued *Miranda* warnings and searched each occupant. *Id.* The officer then searched the passenger compartment of the car and found cocaine in the pocket of Belton's jacket, which was in the back seat. *Id.*

In concluding that the search of the car was lawful under the Fourth Amendment as a search incident to arrest, this Court began its analysis by observing that "[i]t

is a first principle of Fourth Amendment jurisprudence" that before the police may conduct a search, they must convince a neutral magistrate that they have probable cause to obtain a warrant for that search. *Id.* at 457. Absent a warrant or the application of an exception to the warrant requirement, the search is improper. *Id.* The Court noted that a search conducted incident to a lawful arrest is one of those exceptions because of the need to search the arrestee and "the immediately surrounding area" in order to locate any weapons and any evidence that could be concealed or destroyed. *Id.* While recognizing this exception, the Court reaffirmed the principle announced in *Terry v. Ohio*, 392 U.S. 1 (1968), and emphasized in *Chimel* that "'the scope of [a] search must be "strictly tied to and justified by" the circumstances which rendered its initiation permissible.'" *Belton*, 453 U.S. at 457 (alteration in original) (quoting *Chimel*, 395 U.S. at 762 (quoting *Terry*, 392 U.S. at 19)). The *Belton* Court also noted that the *Chimel* Court had found "'no comparable justification . . . for routinely searching any room other than that in which an arrest occurs – or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself.'" *Belton*, 453 U.S. at 458 (quoting *Chimel*, 395 U.S. at 763).

While reaffirming the "reaching distance" test established in *Chimel*, the *Belton* Court noted that lower courts had found it difficult to apply in cases concerning "the proper scope of a search of the interior of an automobile incident to a lawful custodial arrest of its occupants." *Belton*, 453 U.S. at 459 (citing lower court cases reaching conflicting results). In particular, the Court acknowledged that "courts have found no workable definition of 'the area within the immediate control of the arrestee' when that

area arguably includes the interior of an automobile and the arrestee is its recent occupant." *Id.* at 460.

Stressing the importance of a clear standard to guide police and citizens in this "recurring factual situation," the Court observed that the cases addressing such situations "suggest[ed] the generalization that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m].'" *Id.* (second alteration in original) (quoting *Chimel*, 395 U.S. at 763). In order to establish a "workable rule" for this "category of cases," the Court "read *Chimel*'s definition of the limits of the area that may be searched in light of that generalization," and held that "when a policeman has made a lawful custodial arrest of the *occupant* of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Id.* (emphasis added) (footnote omitted). The Court further explained that police may also examine the contents of containers found within the passenger compartment, whether open or closed, because "if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach." *Id.* The car's trunk, however, may not be searched. *Id.* at 460 n.4.

In so holding, the Court clarified that it did "no more than determine the meaning of *Chimel*'s principles in this particular and problematic context. It in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests." *Id.* at 460 n.3. As such, the Court conveyed its belief that the search incident to arrest exception to the Fourth Amendment's warrant requirement, even

as applied to cars, remained limited in its application, specifically to areas within the reaching distance of an arrestee.

Ultimately, what *Belton* established was a rule to govern the permissible scope of searches of cars conducted incident to lawful arrests of occupants of those cars: police may search the passenger compartment in its entirety, including open and closed containers, but they may not search the trunk. This is a "bright-line" rule that dispenses with the need for fact-specific inquiries in individual cases as to whether particular areas of the passenger compartment or containers in it satisfy the *Chimel* "reaching distance" test.

Belton, then, by its own terms, addressed only the *scope* of a search once the search was authorized by virtue of the lawful custodial arrest of the occupant of a car made while the occupant was in the car or within reaching distance of it. What *Belton* did not do, however, was to explicitly define the term "occupant" for purposes of the application of its bright-line rule, even though the facts of the case implicitly define that term. The Court's repeated references to a car's "occupant," *see* 453 U.S. at 455, 459, 460, make clear that the police may search a car incident to a lawful arrest when the arrestee is still physically in the car when he is first observed by the police and then arrested either while he is inside the car, or outside the car so long as he remains within reaching distance of it. However, while the Court made a lone passing reference to a car's "recent occupant," *id.* at 460, it did not define that term, except inferentially by the facts of the case.

3. The Court of Appeals' Misreading of *Chimel* and *Belton*

The Court of Appeals affirmed the *Belton* search of Mr. Thornton's car, finding that he was in "close proximity" to it when Officer Nichols approached him. 325 F.3d at 196, J.A. 74-75. Thus, Mr. Thornton was "positively linked" to the car, "both temporally and spatially" prior to and at the time of his arrest. 325 F.3d at 196, J.A. 75. As such, the court defined "area of immediate control" in terms of linkage to the car to be searched and the arrestee's proximity to the car. As noted previously, however, *Chimel* and *Belton* require that the arrestee be within *reaching distance* of the area to be searched, not merely within "close proximity" or "positively linked" to it. Consequently, the proximity approach adopted by the Court of Appeals is at odds with this Court's decisions.

First, the proximity approach is wholly untethered from the exigency rationales that justify the search incident to arrest exception. *Chimel* and *Belton* grounded their holdings on the historic rationales underlying that exception – officer safety and prevention of the destruction of evidence. *See Belton*, 453 U.S. at 457. Yet the proximity approach has no nexus to those justifications because it focuses on distance and time as to someone not occupying a car, without any apparent consideration of how those factors bear upon whether the arrestee might obtain weapons or evidence from the car. Indeed, the approach effectively abandons the "area of immediate control" test that is the touchstone of *Chimel* and that was preserved by *Belton*, and instead expands the meaning of *Belton*'s "occupant" to include clear non-occupants who may or may not be within reaching distance of the car. Just as this Court presciently warned in *Chimel*, warrantless searches

would have no "point of rational limitation" – i.e., no tie to the exigent circumstances that justify the exception to the warrant requirement – once they are allowed to go beyond an arrestee's reaching distance. *Chimel*, 395 U.S. at 766.

This is not an abstract or theoretical concern. A review of even a few cases demonstrates that there is no logical stopping point to the scope of warrantless car searches once courts apply a test divorced from the reasons for the search incident to arrest exception. *See, e.g.*, *United States v. Arango*, 879 F.2d 1501, 1503, 1506 (7th Cir. 1989) (upholding car search as incident to arrest where suspect was arrested a block away from his car and was returned to his car under the direction and control of police; court reasoned that suspect was again "in proximity to the jeep" and that search was "nearly contemporaneous" to arrest), *cert. denied*, 493 U.S. 1069 (1990); *United States v. Patterson*, 65 F.3d 68, 69-71 (7th Cir. 1995) (upholding car search as incident to arrest although officer never observed arrestee, who was working under the hood of his car, inside the car), *cert. denied*, 516 U.S. 1061 (1996); *Cason v. Commonwealth*, 530 S.E.2d 920, 922, 924 (Va. Ct. App. 2000) (upholding moped search as incident to arrest where police never saw suspect on moped, but suspect, who was carrying a motorcycle helmet, told police that the moped was in a yard approximately twenty-five to thirty feet away).

Second, the proximity approach is not compelled, nor even supported, by *Michigan v. Long*, 463 U.S. 1032 (1983), a case the Court of Appeals relied upon in determining that this Court "has clearly indicated, albeit in dicta, that an officer may search an automobile incident to an arrest, even if the officer has not initiated contact while the arrestee was still in the automobile." 325 F.3d at 194,

J.A. 71. In *Long*, two police officers observed Long's car traveling erratically and speeding late at night. After watching the car go into a ditch, they stopped to investigate. Long met the officers at the rear of the car.[5] Suspecting that Long was intoxicated, the officers asked to see his license and car registration. As Long walked toward the open door of his car to retrieve his registration, followed by both officers, they observed a large hunting knife on the driver's side floorboard. After frisking Long, one officer stayed by him while the other officer conducted a search of the passenger compartment for other weapons. Inside the car he found marijuana. The officers arrested Long for possession of marijuana and impounded his car. 463 U.S. at 1035-36. This Court held that a protective search of the passenger compartment of Long's car was valid because the officers had an articulable suspicion that Long was dangerous and that the car contained weapons, and the officers were allowing Long to reenter it. *Id.* at 1035, 1052.

After noting that the officers observed Long driving "erratically and at excessive speeds," the Court commented in a footnote that "if the officers had arrested Long for speeding or for driving while intoxicated, they could have searched the passenger compartment under *New York v. Belton*." *Id.* at 1035 & n.1. Later in the opinion, in another footnote, the Court further commented, "the 'bright line' that we drew in *Belton* clearly authorizes . . . a

[5] It is unclear from the Court's description of the facts whether the officers were in active pursuit of Long's car or had initiated contact with it before it ran off the road. *See People v. Long*, 320 N.W.2d 866, 868 (Mich. 1982) (noting that the officers "turned their vehicle around and pursued the speeding vehicle"), *rev'd*, 463 U.S. 1032 (1983).

search whenever officers effect a custodial arrest." *Id.* at 1049 n.14. These dicta, though, suggest nothing more than that the officers would have been authorized to search the car had they arrested Long for speeding or driving while intoxicated as he remained within reaching distance of his car, the door of which was open.

Moreover, the Court's dicta must be considered in their larger context. As the Court acknowledged, the respondent conceded that the search incident to arrest exception applied. *Id.* at 1035 n.1. Thus, the Court did not need to have an extended discussion of *Belton*. Further, this Court decided *Long* only two years after *Belton* – before it had become apparent that courts were struggling with the meaning of "recent occupant." The Court could not possibly have intended by two offhand comments, made only in footnotes, to expand *Belton*, involving as it does an issue of such constitutional significance as the scope of an exception to the Fourth Amendment's warrant requirement. *See United States v. Robinson*, 414 U.S. 218, 229 (1973) (declining to "impose a novel and far-reaching limitation" on the search incident to arrest exception based on an "unexplained and unelaborated sentence" in an earlier Supreme Court opinion). Taken together, all of these factors severely undermine the Court of Appeals' reliance on *Long* to justify its expansion of the *Belton* rule.

B. The Proximity Approach Yields Inconsistent Results and Sets No Clear Outer Limit for Defining Recent Occupant, Thus Blurring the Bright Line *Belton* Meant to Establish

In addition to its radical departure from this Court's prior decisions and the exigency rationales supporting

them, the proximity approach also fails to provide a straightforward, workable standard in its application – a significant part of the *Belton* Court's rationale for establishing a per se rule. *Belton*, 453 U.S. at 458, 459, 460. Rather than solving line-drawing problems in this area, the approach instead merely shifts the line-drawing inquiry to questions of place and time. For example, is an occupant "recent" when he is ten feet from the car? Twenty? Fifty? Is an occupant "recent" when he has been out of the car for five minutes? Ten minutes? Thirty? What about two hours? Under the proximity approach, what linkage is sufficient? Must the arrestee possess keys to the car? Does it matter if the police even observe the arrestee inside the car? Because the proximity approach does not and cannot answer these questions, it will lead only to uncertain and inconsistent outcomes in this area.

In fact, the lower courts considering such questions have, not surprisingly, produced disparate results. For example, one court has upheld a search when the person was "clearly outside the grabbable area" (i.e., reaching distance) of the car. *State v. Gonzalez*, 487 N.W.2d 567, 571 (Neb. Ct. App. 1992). Other courts have upheld automatic searches of cars incident to arrest when the arrestee was at least twenty, if not thirty feet from the car, but under police surveillance. *See, e.g.*, *Glasco v. Commonwealth*, 513 S.E.2d 137, 138 (Va. 1999); *People v. Bosnak*, 633 N.E.2d 1322, 1323, 1326-27 (Ill. App. Ct. 1994); *State v. McClendon*, 490 So. 2d 1308, 1309-10 (Fla. Dist. Ct. App.), *rev. denied*, 500 So. 2d 544 (Fla. 1986). Another court upheld a search incident to arrest when the suspect was twenty-five to thirty feet from his vehicle (a moped) but the officer had not seen him on it. *Cason v. Commonwealth*, 530 S.E.2d 920, 922, 924 (Va. Ct. App. 2000).

In contrast to the foregoing cases, the United States Court of Appeals for the Fifth Circuit found a search of a defendant's car to be *invalid* where the police arrested him only six to ten feet from his car shortly after he had exited it. *United States v. Green*, 324 F.3d 375, 379 (5th Cir.), *cert. denied*, 124 S. Ct. 152 (2003). Another court found that a person was not a recent occupant of his truck when the police found him in a bar and the record did not reflect his proximity to his truck in the parking lot at the time he was arrested outside the bar, or how long he had been out of the truck. *Gauldin v. State*, 683 S.W.2d 411, 414 (Tex. Crim. App. 1984), *overruled on other grounds by State v. Guzman*, 959 S.W.2d 631 (Tex. Crim. App. 1998). Yet another court found that a person was not a recent occupant when he had been out of the car for over two hours and had walked three miles to his home, returning later to his car. *State v. Vanderhorst*, 419 So. 2d 762, 764 (Fla. Dist. Ct. App. 1982). Similarly, the Arizona Supreme Court has ruled that a person was not a recent occupant because he had been out of his car and in his house for more than two hours, even though he had fled his car to escape the police. *State v. Dean*, 76 P.3d 429, 437 (Ariz. 2003). This wide disparity of results makes plain that the proximity approach is anything but a "straightforward" or "workable" inquiry. *See Belton*, 453 U.S. 459, 460.

C. The Proximity Approach Does Not Further Officer Safety

In determining that *Belton* permits searches in cases such as Mr. Thornton's, the Court of Appeals maintained that limiting *Belton* would jeopardize officer safety because it would force officers to confront or signal confrontation of an arrestee while he is still in a car. 325 F.3d at 195,

J.A. 72. Specifically, the court noted that "when encountering a dangerous suspect, it may often be much safer for officers to wait until the suspect has exited a vehicle before signaling their presence, thereby depriving the suspect of any weapons he may have in his vehicle." *Id.* Consequently, the court determined that the police should still be able to search a car incident to arrest even where the arrestee was not in his car at the time the police approach him.

In the situation the Court of Appeals describes, however, the very basis of the search incident to arrest exception – preventing an arrestee's access to weapons and evidence in his car – is obviated when "officers . . . wait until the suspect has exited . . . , thereby depriving the suspect of any weapons he may have in his vehicle." It makes little sense to apply an exception designed to prevent access to weapons or evidence in a car when a suspect already has deprived himself of that very access by leaving the car. For the person who has left the car, what he has on his person, not what he leaves behind in the car, presents the real risk, and that risk is always present for an officer whenever he makes an arrest. But both the *Terry* frisk exception and the *Robinson* search incident to arrest exception provide the police with recourse to protect themselves. *See United States v. Robinson*, 414 U.S. 218 (1973); *Terry v. Ohio*, 392 U.S. 1 (1968). Indeed, Officer Nichols availed himself of that protection when he frisked Mr. Thornton prior to the arrest. J.A. 11, 19. Further, if the police have a reasonable suspicion even before they arrest a person standing near a car that he may be dangerous, the officers may protect themselves by searching the car pursuant to *Long*. *Long*, 463 U.S. at 1035.

In short, the proximity approach amounts to little more than a rule of convenience for police officers that enables them to conduct searches of cars in almost all situations involving the arrest of someone who can be linked to a car and is somewhere near it, even when those situations are entirely divorced from the exigency justifications upon which the *Belton* rule rests. Put another way, the proximity approach comes dangerously close to granting the police an automatic right to search cars in all instances of a custodial arrest near a car, even when they have no probable cause, or even reasonable suspicion, as to the car itself.

This approach thus turns Fourth Amendment law on its head. Rather than being per se unreasonable, warrantless searches of cars would be uniformly permissible when a former occupant is arrested, subject only to the "limitations" of attenuated distance and/or time and some sort of linkage. However, the distance and time factors are in many cases entirely within the control of the police. Even the linkage factor may be within an officer's control. *See United States v. Sholola*, 124 F.3d 803, 807 (7th Cir. 1997) (police officer asked suspect if he had a car). As a practical result, therefore, the proximity approach would permit warrantless car searches incident to the arrests of "recent" occupants in the vast majority of cases. Although such a result may suit the police, it flies in the face of the core Fourth Amendment principles that warrantless searches are "per se unreasonable," *Katz v. United States*, 389 U.S. 347, 357 (1967), and that exceptions to the warrant requirement must be "jealously and carefully drawn," *Jones v. United States*, 357 U.S. 493, 499 (1958). There is nothing careful or precisely drawn about the proximity approach.

II. THIS COURT SHOULD REAFFIRM THE REASONABLE LIMITS ESSENTIAL TO *BELTON*'S BRIGHT-LINE RULE

Instead of the amorphous and manipulable approach that the Court of Appeals adopted, this Court should adopt a rule that is drawn from *Belton*'s facts and language and tied to its reasoning. *Belton* itself suggests two alternatives. One alternative, which was proposed by Mr. Thornton and rejected by the Court of Appeals, limits *Belton*'s application to cases in which a police officer initiates contact with an arrestee while he is in the car and arrests him either in the car or within reaching distance of it (the "contact initiation rule"). This rule fits with the facts of *Belton* and its references to "occupant" and "recent occupant." The other alternative, a limited version of the proximity approach, permits an officer to search a car only when the arrestee is still physically in the car when he is arrested, or having just exited the car, remains within reaching distance of it when arrested (the "limited proximity approach"). This alternative also fits the facts and language of *Belton*, and is closely linked to the two exigency rationales underpinning the search incident to arrest exception. Both alternatives are easier to apply than the proximity approach employed by the Court of Appeals, and both protect the safety of police officers. Further, regardless of which of these two alternatives the Court chooses to adopt, the United States has not proven that the search of Mr. Thornton's car was reasonable as it has not shown that Mr. Thornton was still within reaching distance of his car when he was arrested.

A. *Belton*'s Automatic Search Rule Should Be Restricted to Cases in Which the Police Initiate Contact With the Arrestee While He Is in the Car

Under the contact initiation rule, a police officer may conduct an automatic search of a car when the officer has initiated contact with the person while he is still in the car and the officer subsequently arrests the person while he is either still in the car or within reaching distance of it. Under this rule, the determination that the officer or a court reviewing his actions must make is purely factual. It focuses solely on the officer's actions, and only those actions. Did the officer indicate his presence to the subsequent arrestee while that person was in the car? Did the officer turn on his lights or siren? Did the officer use a loudspeaker to announce his presence or direct the car to pull over? Did the officer approach the car and shine a flashlight into it? Further, under the contact initiation rule, what the person in the car knew about the officer's presence is not relevant to the determination. Consequently, when or why the person may leave the car, including an exit prompted by a command from the officer, is irrelevant. That is, there is no subjective component of the contact initiation rule, either as to the officer's or the occupant's intent.[6]

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[6] The contact initiation rule has been criticized for requiring a determination of the subjective reasons why a person leaves a car in cases in which a person gets out of a car after the police initiate contact but before they physically reach him. *See* Petitioner's Brief on the Merits at 6, *Florida v. Thomas*, 532 U.S. 774 (2001) (No. 00-391) (dismissing for lack of jurisdiction); Petitioner's Brief on the Merits at 18, *Arizona v. Gant*, 124 S. Ct. 461 (2003) (mem.) (No. 02-1019)

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1. The Contact Initiation Rule Comports With This Court's Prior Decisions

The contact initiation rule is grounded in this Court's own decisions, particularly *Belton* itself. *Belton*'s facts and holding establish a per se rule that applies only when the police initiate contact with the arrestee while he is an occupant of a car. As described earlier, *see supra* Section I.A.2, Roger Belton and three others were occupants of a car when their car was stopped by a New York State police officer for speeding. 453 U.S. 454, 455 (1981). Based on the officer's smell of burnt marijuana and his observation of the "Supergold" envelope, he arrested the occupants. *Id.* Under these circumstances, where the police had initiated contact with the arrestees while they were still in their car, this Court held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Id.* at 460 (footnotes omitted).

(vacating judgment and remanding for further consideration). These critics, however, read in a component of the rule that does not exist. This "subjective" component appears to stem from the language in some decisions distinguishing between factual situations in which the police directed a person to exit a car and those in which the police did not direct the person to exit the car. *See, e.g.*, *United States v. Hudgins*, 52 F.3d 115, 119 (6th Cir.), *cert. denied*, 516 U.S. 891 (1995); *Thomas v. State*, 761 So. 2d 1010, 1013-14 (Fla. 1999), *cert. dismissed*, 532 U.S. 774 (2001); *People v. Fernengel*, 549 N.W.2d 361, 362-63 (Mich. Ct. App.), *appeal denied*, 552 N.W.2d 170 (Mich. 1996), *and cert. denied*, 520 U.S. 1110 (1997). The fact that the cases use the word "voluntary" to indicate that the person exited the car on some basis other than at police direction, however, does not introduce a subjective component into the rule.

"[T]he *Belton* Court made very clear that the bright-line rule enunciated in that case extended only as far as its factual context." *Lewis v. United States*, 632 A.2d 383, 385-86 (D.C. 1993). "The Supreme Court's references in *Belton* to 'a search . . . after the arrestees are no longer in [the automobile]' and to 'recent occupant[s]' of an automobile clearly pertain to occupants who have been removed by the police, which is precisely what occurred in that case." *Id.* at 386 n.6 (citations omitted). Further, a custodial arrest of a car's occupant generally takes place only after that person has left the car. In fact, "it would be an unusual situation for a police officer not to remove a suspect from a car while going through the arrest process, both for reasons of safety and because of the practical physical limitations of effecting an arrest in such a confined area." *Daygee v. State*, 514 P.2d 1159, 1166 (Alaska 1973). It is apparent from *Belton* itself, therefore, that for purposes of applying the *Belton* rule, an occupant becomes a "recent occupant" at the time of arrest when he leaves the car after the police have initiated contact while he was in it.

The contact initiation rule also is consistent with analogous Fourth Amendment rules governing when an officer may search a house incident to arrest, including *Chimel*. In *Chimel*, the police initiated contact with the defendant only after he had come into his house and the officers handed him the arrest warrant issued against him. 395 U.S. 752, 753 (1969). Conversely, in *Vale v. Louisiana*, 399 U.S. 30, 33-34, 35 (1970), this Court held that the police could not search a defendant's house when they had arrested him outside of the house. It is clear from the facts of *Vale* that the police did not initiate contact with the defendant until he was outside of his house, much

less arrest him. *Id.* at 32-33. Similar to *Vale*, then, if the police have not initiated contact with a car's occupant while he is in the car, that person's decision to leave the car, whatever the reason, does not give rise to an automatic search of his car merely because he is near it.

2. The Contact Initiation Rule Is Easy to Understand and to Apply

In addition to being soundly based in this Court's decisions, the contact initiation rule is easily understood and can be routinely followed by both police officers and courts. An officer in the field or a trial judge evaluating the legality of a search can quickly determine whether or not the officer had initiated contact with the arrestee while that person was still in a car. Indeed, in most instances, arrests will be the product of traffic stops in which the officer signals the driver to pull over by activating his lights or siren or by using a loudspeaker. In other situations, an officer need only determine whether or not he has spoken to, or otherwise signaled to, someone inside a car. If the officer has done so, and if he then effectuates a lawful custodial arrest within reaching distance of the car, he may search the car contemporaneously with that arrest.

3. The Contact Initiation Rule Does Not Reduce Officer Safety

The Court of Appeals in this case rejected the contact initiation rule in part because of its concern that officers will have to "race" from their patrol cruisers to a car to prevent an occupant from exiting his car, thus exposing

themselves to danger. 325 F.3d at 196, J.A. 73. This concern is unfounded for two reasons.

First, as other courts have recognized, if a police officer initiates contact with a car's occupant, that occupant cannot "*Belton*-proof" the car by leaving it before the officer leaves his car, as long as the officer arrests the person within reaching distance of the car. *See Thomas v. State*, 761 So. 2d 1010, 1013-14 (Fla. 1999) (warning that *Belton* applies even if defendant leaves car when officer approaches), *cert. dismissed*, 532 U.S. 774 (2001); *accord State v. Harris*, 942 P.2d 568, 572 (Idaho Ct. App. 1997) (in case where officer pursued defendant with lights activated but defendant drove to his house, got out of car, and walked toward the house, stating that "[a] hasty exit from the automobile *after* an officer has initiated contact does not enable a suspect to avoid a search of the passenger compartment incident to arrest") (emphasis in original). Further, if the person leaves his car and moves beyond reaching distance of it before the officer gets to him, the officer would have no reason to fear that the person would or could reach into the car for a weapon or evidence. Therefore, the two rationales supporting the search incident to arrest exception would not be met in the first instance, and the exception should not be applied unless the person moves back to within reaching distance of the car.

Second, in those cases where an officer does not initiate contact until after the arrestee is out of the car, the officer will still have available other exceptions to the warrant requirement under which he may be able to justify a search. Only a few years ago, in *Knowles v. Iowa*, 525 U.S. 113 (1998), this Court relied upon that very fact when it declined to expand the *Belton* rule to cases involving

the issuance of a citation rather than a full-blown arrest. The Court agreed that officer safety is certainly at issue in a routine traffic stop, but found that that concern "does not by itself justify the often considerably greater intrusion attending a full field-type search." *Id.* at 117. The Court then recognized that "[e]ven without the search authority Iowa urges, officers have other, independent bases to search for weapons and protect themselves from danger." *Id.*

For example, the officer can ask for consent to search the car. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). He can impound the car following the arrest and inventory its contents. *South Dakota v. Opperman*, 428 U.S. 364 (1976). If the officer has concern for his safety, he may be able to undertake a protective sweep of the car, as in *Michigan v. Long*, 463 U.S. 1032, 1049 (1983). The officer also can look to the automobile exception, *Carroll v. United States*, 267 U.S. 132, 149, 155-56 (1925), if he has probable cause to believe the car contains contraband, or to the forfeiture exception, *Florida v. White*, 526 U.S. 559, 561 (1999), if he has probable cause to believe the car is an instrument of a crime. These latter two exceptions become particularly relevant in the context of undercover surveillance of cars, as an officer who has been observing a car will probably have seen something that gives rise to probable cause. In short, the search incident to arrest exception is not an officer's only basis for searching a car: any one of these other exceptions to the warrant requirement may provide a justification – if, of course, the officer and government can establish its applicability. *See United States v. Jeffers*, 342 U.S. 48, 51 (1951) (noting that "the burden is on those seeking the exemption to show the need for it"); *McDonald v. United States*, 335 U.S. 451, 456

(1948) (stating that warrant requirement cannot be excused without "a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative").

In summary, the contact initiation rule provides a simple, bright-line test for determining who is a recent occupant of a car in order to apply *Belton*. Restricting *Belton* to cases in which officers made their initial contact with a car's occupant avoids the case-by-case decisions that would otherwise be necessary for officers and judges to make. Moreover, if the police do not initiate contact with a person while he is in the car, the police still have other options that both promote officer safety and prevent the destruction of evidence and, at the same time, respect the protections afforded by the Fourth Amendment.

B. Alternatively, a Limited Proximity Approach Also Provides an Appropriate, Workable, and Reasonable Application of *Belton*

Should this Court reject the contact initiation rule in favor of the proximity approach, then the Court should modify that approach so that it limits "recent occupancy" of a car to the distance and time factors that mattered in *Belton* itself. Specifically, the Court should find that a person is a "recent occupant" of a car only when that person, having just exited the car, remains within reaching distance of it at the time of his arrest.

This limitation allows the proximity approach to comport with this Court's prior decisions. It clearly fits with the facts of *Belton*. It also squares with *Long*, as Long had just gotten out of his car and was arrested at the rear

of it. *See* 463 U.S. 1032, 1036 (1983). Additionally, like the contact initiation rule, the limited proximity approach is straightforward and easy for police officers and judges alike to understand and apply, as it would involve only two objective factual determinations: first, did the person just get out of his car, and second, was he still within reaching distance of the car when he was arrested? Most importantly, unlike the proximity approach adopted by the Court of Appeals, the requirement of the limited proximity approach that the person be arrested within reaching distance of the car dovetails with the two rationales underlying the search incident to arrest exception – protecting police officers and preventing the concealment or destruction of evidence. Thus, the limited proximity approach enables the search incident to arrest exception as applied to cars to remain just that: an exception to the Fourth Amendment's warrant requirement, not the rule.

C. Applying Either the Contact Initiation Rule or the Limited Proximity Approach, the United States Failed to Establish That the Search of Mr. Thornton's Car Was Reasonable Under the Fourth Amendment

Applying the contact initiation rule to Mr. Thornton's case, it is readily apparent that he was not an occupant or recent occupant of a car as is required for purposes of applying the *Belton* rule. Nothing in the record of this case indicates that Officer Nichols did anything to initiate contact with Mr. Thornton while he was in his car. The officer did not turn on his lights or siren, or in any way indicate his presence to Mr. Thornton until the latter had exited his car and begun to walk away from it. Under these circumstances, the United States cannot rely on the

search incident to arrest exception to justify the search of Mr. Thornton's car.

Similarly, the United States cannot sustain its burden under the limited proximity approach. The United States did not demonstrate below that Mr. Thornton was still within reaching distance of his car when Officer Nichols arrested him. Officer Nichols never testified as to what constitutes "reaching distance," or whether Mr. Thornton was within that distance vis-a-vis his car when the arrest occurred. Further, the district court made no factual findings on these points.

Indeed, the Court of Appeals specifically acknowledged that the record did not establish the actual distance between Mr. Thornton and his car. 325 F.3d at 196, J.A. 74. Instead, all that the court could conclude was that Officer Nichols approached Mr. Thornton "within moments" of when he left his car, and that Mr. Thornton was in "close proximity, both spatially and temporally," to his car when arrested. *Id.* "Within moments" and "close proximity," however, are much too vague to be sufficient for the United States to prove that Mr. Thornton was within *reaching distance* of his car when Officer Nichols arrested him. Consequently, the United States did not carry its burden of demonstrating the applicability to Mr. Thornton's case of the search incident to arrest exception to the warrant requirement. The search of his car was therefore unreasonable under the Fourth Amendment.

CONCLUSION

For the reasons stated above, this Court should reverse the judgment of the Court of Appeals.

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In the Supreme Court of the United States

MARCUS THORNTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a police officer may search the passenger compartment of an automobile as a contemporaneous incident of the lawful custodial arrest of the vehicle's recent occupant when the arrestee exited the vehicle voluntarily rather than on police direction.

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In the Supreme Court of the United States

No. 03-5165

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v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (J.A. 61-75) is reported at 325 F.3d 189. The opinion of the district court (J.A. 30-37) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 3, 2003. The petition for a writ of certiorari was filed on July 1, 2003, and was granted on November 3, 2003. The jurisdiction of this Court is invoked nder 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides in relevant part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.

STATEMENT

Petitioner was charged with possession of cocaine base with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Count 1); possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g)(1) (Count 2); and possession of a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1) (Count 3). After the district court denied petitioner's motion to suppress evidence, J.A. 30-37, a jury found petitioner guilty on all three counts. Petitioner was sentenced to concurrent terms of 120 months of imprisonment on Counts 1 and 2, and to a consecutive term of 60 months of imprisonment on Count 3, to be followed by eight years of supervised release. The court of appeals affirmed. J.A. 61-75.

1. On July 21, 2001, Police Officer Deion L. Nichols was patrolling Sewells Point Road in Norfolk, Virginia, in an unmarked police car by himself. After he observed petitioner's vehicle—a gold Lincoln Town Car—drive by, he ran a computer check on its tags.[1] The check revealed that the tags had been issued to a 1982 Chevrolet-model vehicle, not a Lincoln Town Car. Officer Nichols pursued the Lincoln with the intent of pulling it over to inquire about the tags. Before Officer Nichols could make a traffic stop, however, petitioner made a turn into a shopping center parking lot, parked his car, and exited it. J.A. 62-63; see J.A. 9-10, 40-42.

[1] When Officer Nichols ran the computer check on petitioner's Lincoln, he believed that it was the same gold car that he had just observed being driven on Sewells Point Road in a suspicious manner. He later became "unsure," however, "whether the gold Lincoln Town Car he managed to get behind was the one that first aroused his suspicion." J.A. 31 n.1; see J.A. 9-10, 12-14.

Officer Nichols pulled in behind the Lincoln and, as he later testified, "got out [of his patrol car] and approached [petitioner] as he exited his vehicle." J.A. 46; see J.A. 42 ("I pulled in right behind him. As [petitioner] exited his vehicle, I also exited my vehicle."). Officer Nichols—who was in uniform—immediately approached petitioner, asked to see his license, and explained that his vehicle did not match the registered vehicle. Petitioner "appeared nervous," and he "right away started rambling," "licking his lips," and "sweating." J.A. 63; see J.A. 42, 47-48. Petitioner told Officer Nichols that "someone had just given him the car." J.A. 63. Officer Nichols asked petitioner if he had any narcotics or weapons on him or in his car and petitioner replied "no." *Ibid.*

Petitioner consented to a pat-down search for weapons. During the pat-down, Officer Nichols detected a bulge in petitioner's front left pocket. J.A. 63. Officer Nichols asked petitioner whether he had any narcotics on him. Petitioner responded that he had "a bag of weed." *Ibid.* Officer Nichols asked petitioner to remove it from his pocket. Petitioner reached into his pocket and produced two bags. One bag contained a green leafy substance consistent with marijuana; the other bag contained a large amount of a white rocklike substance consistent with crack cocaine. Officer Nichols arrested petitioner, handcuffed him and put him in the back of his police car, and searched petitioner's car. The search revealed a loaded semi-automatic pistol under the front driver's seat. *Ibid.*; see J.A. 11, 32, 42-43.

2. Before trial, petitioner moved to suppress the firearm found in his car. In particular, petitioner argued that the warrantless search of his vehicle was not justified as a search incident to arrest under *New York* v. *Belton*, 453 U.S. 454 (1981), because petitioner

had voluntarily exited his vehicle before he was confronted by Officer Nichols, as opposed to having been ordered out of the car. The district court denied petitioner's motion and held that the search of petitioner's vehicle was valid under *Belton*. J.A. 30-37.

After a two-day trial, a jury found petitioner guilty on all counts. Petitioner moved for a new trial pursuant to Fed. R. Crim. P. 33, reiterating his argument that the search of the vehicle was not authorized by *Belton*. The district court denied that motion on the basis of the earlier ruling denying the motion to suppress. J.A. 59.

3. The court of appeals affirmed. J.A. 61-75. Petitioner's "sole contention on appeal" was that the search of his car was unlawful because "the search incident to arrest doctrine, as applied to searches of automobiles in *New York* v. *Belton*, 453 U.S. 454 (1981), required Officer Nichols to 'initiate . . . contact with [petitioner], either by actually confronting [petitioner], or signaling confrontation with [petitioner], while [petitioner] was still in his vehicle." J.A. 65; see also J.A. 68 ("[Petitioner] contends that the *Belton* rule does not govern this case because he was not an 'occupant of an automobile' when Officer Nichols confronted him."). The court of appeals rejected that contention and held that "Officer Nichols lawfully searched [petitioner's] automobile incident to the arrest." J.A. 75.

The court of appeals reasoned that this Court's own decisions "clearly indicate[], albeit in dicta, that an officer may search an automobile incident to an arrest, even if the officer has not initiated contact while the arrestee was still in the automobile." J.A. 71 (citing *Michigan* v. *Long*, 463 U.S. 1032, 1035-1036 & n.1 (1983)). Furthermore, the court stated, "the historical rationales for the search incident to arrest doctrine—'the need to disarm the suspect in order to take him into custody' and 'the need to preserve evidence for later use at trial'—do not permit [a] limitation on the *Belton* rule" based on "whether the arrestee exits the automobile voluntarily or because of confrontation with an officer." J.A. 72. The court determined that "[petitioner]'s proposed limitation of the *Belton* rule would raise serious safety concerns for law enforcement personnel" by "requir[ing] officers to actually confront or signal confrontation with an arrestee while the arrestee is in the automobile." *Ibid.*

The court of appeals also reasoned that "[t]he conceded close proximity, both temporally and spatially, of [petitioner] and his car at the time of his arrest provides adequate assurance that application of the *Belton* rule to cases like this one does not render that rule limitless." J.A. 74. As the court explained, "[petitioner] concedes that he was in close proximity to his vehicle when Officer Nichols approached him," and the record "conclusively show[s] that Officer Nichols observed [petitioner] park and exit his automobile and then approached [petitioner] *within moments*." J.A. 73-74 (emphasis in original). Accordingly, the court found, "'no doubt exists that the car was within [petitioner's] immediate control at the beginning of his encounter with' Officer Nichols." J.A. 74.[2]

SUMMARY OF ARGUMENT

The court of appeals correctly held that the search of petitioner's vehicle was lawful under the Fourth Amendment as an incident to his custodial arrest, even

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[2] Because the court of appeals held that the search of petitioner's vehicle was valid under *Belton*, it did not "reach the district court's alternative holding that Officer Nichols could have conducted a lawful inventory search." J.A. 75; see J.A. 35-36.

though petitioner got out of his car voluntarily rather than on police direction.

A. It is well-established that, when law enforcement personnel lawfully arrest an individual, they may search the arrestee's person and the immediately surrounding area without obtaining a warrant. *Chimel* v. *California*, 395 U.S. 752 (1969); *Weeks* v. *United States*, 232 U.S. 383 (1914). In *New York* v. *Belton*, 453 U.S. 454, 460 (1981), this Court adopted a bright-line rule to guide police officers in the commonly recurring and highly dangerous situation in which the "recent occupant" of an automobile is arrested: an officer may search the passenger compartment of the vehicle that the arrestee has just occupied as a contemporaneous incident of the arrest. *Belton*'s bright-line rule applies whenever such an arrest takes place, whether or not the police initiate contact with an arrestee while he is still inside the vehicle.

B. Petitioner's proposed initiation-of-contact rule has no foundation either in this Court's decision in *Belton* or the rationales underlying *Belton*. By its terms, the *Belton* rule applies to the arrest of the "recent occupant" of a vehicle. 453 U.S. at 460. Indeed, the vast majority of *Belton* searches—including the search in *Belton* itself—are not conducted until after an arrestee has exited a car. The *Belton* rule is grounded on the rationales of the search-incident-to-arrest doctrine —the need to protect officer safety and to preserve evidence of a crime. Those rationales are implicated "whenever officers effect a custodial arrest" of the recent occupant of a vehicle, *Michigan* v. *Long*, 463 U.S. 1032, 1049 n.14 (1983), regardless of whether the arrestee exited the vehicle voluntarily or on police direction.

A holding that *Belton* does not apply unless police confront arrestees while they are still *inside* a vehicle would be likely to compromise police safety by increasing the volatility and thus the hazards of *Belton* encounters. Such a limitation would create an incentive for suspects to jump out of cars before police initiate contact with them and, at the same time, encourage police to rush contact with suspects before they can exit a car, creating a potentially explosive dynamic in what this Court has already recognized is an "especially hazardous" situation for police. *Long*, 463 U.S. at 1049. Similarly, an initiation-of-contact rule could interfere with surveillance activities and other situations in which police do not wish to announce their presence until a suspect exits his car.

C. *Belton*'s built-in limitations are straightforward and workable, and far superior to an arbitrary initiation-of-contact rule. First, *Belton* applies only in the case of the lawful custodial arrest of a vehicle's "recent occupant" (453 U.S. at 460); and, second, *Belton* authorizes only those searches that are conducted as a "contemporaneous incident" (*ibid.*) to such an arrest. Those criteria afford police needed flexibility to make judgments about the applicability of *Belton* in the context of unfolding encounters, and may be routinely applied in the vast majority of *Belton* situations. Whatever debate there may be about the outer margins of *Belton*'s rule, it does not justify depriving police of the clarity and protection of *Belton* in cases, such as this one, where an officer sees an individual exit a vehicle and confronts him moments later.

Nor is there any basis for adopting petitioner's alternative theory that *Belton* should be limited based on an after-the-fact, case-by-case examination of whether a suspect was within "reaching distance" of a car at the

moment of his arrest. Not only has that argument been waived, but it is unsound: subjecting *Belton* to a post hoc, fact-intensive inquiry into whether a recent occupant was within "reaching distance" of the car at the time of his arrest would eviscerate *Belton*'s bright-line rule, and would require police to attempt to make murky and impractical determinations that would complicate administration of the *Belton* rule.

D. The search of petitioner's vehicle was valid under *Belton*. First, petitioner was a "recent occupant" of his car when he was subjected to a lawful custodial arrest. As the court of appeals found, the record "conclusively" establishes that Officer Nichols saw petitioner park and exit the vehicle and met him "*within moments*." J.A. 74 (emphasis in original). Second, the search of petitioner's car was conducted as a "contemporaneous incident" of his arrest. Officer Nichols arrested petitioner, put him in his patrol car, and searched his vehicle as part of one continuous event. *Ibid.* Accordingly, under the Fourth Amendment, the challenged search was a reasonable and, thus, lawful intrusion. The judgment of the court of appeals should be affirmed.

ARGUMENT

THE SEARCH OF PETITIONER'S AUTOMOBILE WAS A LAWFUL INCIDENT TO HIS ARREST

In *New York* v. *Belton*, 453 U.S. 454 (1981), this Court established a bright-line rule to guide the officer in the field in the dangerous and recurring context of the arrest of someone who has just occupied a vehicle. The Court held that police may search the passenger compartment of a vehicle whenever an "arrestee is its recent occupant." *Id.* at 460. This case presents the question whether the *Belton* rule "is confined to situations in which the police initiate contact with the occupant of a vehicle while that person is in the vehicle." Pet. i. Petitioner's "sole contention on appeal" was that the search of his vehicle was not lawful under *Belton*, because Officer Nichols did not initiate contact with him "while [he] was still in his vehicle." J.A. 64-65. As explained below, the court of appeals correctly rejected that contention and held that the search of petitioner's vehicle was lawful.[3]

A. Under *New York* v. *Belton*, Police Officers May Search The Passenger Compartment Of A Car Incident To The Lawful Custodial Arrest Of Any "Recent Occupant" Of The Vehicle

1. The Fourth Amendment to the Constitution guarantees that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated," and further provides that "no Warrants shall issue, but upon probable cause." U.S. Const. Amend. IV. This

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[3] In two recent cases in which the United States participated as an amicus, this Court has granted certiorari to address the same question. See *Florida* v. *Thomas*, 532 U.S. 774, 776 (2001) ("We granted certiorari to consider whether [the *Belton*] rule is limited to situations in which the officer initiates contact with the occupant of a vehicle while that person remains inside the vehicle."); Pet. i, *Arizona* v. *Gant*, 123 S. Ct. 1784 (2003) (No. 02-1019) ("When police arrest the recent occupant of a vehicle outside the vehicle, are they precluded from searching the vehicle pursuant to *New York* v. *Belton* unless the arrestee was actually or constructively aware of the police before getting out of the vehicle?"). In *Thomas*, however, the Court concluded that it lacked jurisdiction because the state court judgment on review in that case was not final, and the Court dismissed the writ of certiorari for want of jurisdiction. 532 U.S. at 776, 781. And, in *Gant*, the Court issued an order before argument vacating and remanding the case in light of an intervening decision of the Arizona Supreme Court. See 124 S. Ct. 461 (2003).

Court has long recognized that when there has been a lawful arrest, a search of the person of the arrestee and the area within his control "is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." *United States* v. *Robinson*, 414 U.S. 218, 235 (1973); see *Weeks* v. *United States*, 232 U.S. 383, 392 (1914). There are two longstanding rationales for the search-incident-to-arrest doctrine: the need "to remove any weapons that the [arrestee] might seek to use in order to resist arrest or effect his escape," and the need to prevent the "concealment or destruction" of evidence. *Chimel* v. *California*, 395 U.S. 752, 763 (1969); see *Knowles* v. *Iowa*, 525 U.S. 113, 116-117 (1998).

As this Court has recognized, the custodial arrest is a highly volatile and dangerous event. See *Knowles*, 525 U.S. at 117; *Robinson*, 414 U.S. at 234-235 & n.5. Between 1992 and 2001, for example, 221 of the 643 law enforcement officers who were feloniously killed in the line of duty were slain in arrest situations, making the arrest by far the most dangerous situation that officers routinely confronted during that period. FBI, U.S. Dep't of Justice, *Uniform Crime Reports: Law Enforcement Officers Killed and Assaulted* 33 (2001) (*Uniform Crime Reports*). In 2001, 24 of the 142 law enforcement officers killed in the line of duty were engaged in arrest situations when they were mortally wounded, and in that same year officers were assaulted while attempting arrests on 9107 occasions. *Id.* at 32, 93; see also FBI, U.S. Dep't of Justice, *Killed in the Line of Duty: A Study of Selected Felonious Killings of Law Enforcement Officers* 3 (Sept. 1992).[4] In

[4] Drug-related arrests, like the arrest in this case, pose a particularly great risk to police officers. In 2001, for example, eight of the 24 officers who were slain in arrest situations were investigating drug-related matters. *Uniform Crime Reports* 32; see *id.* at 33 (between 1992 and 2001, 38 of the 221 officers feloniously killed in arrest situations were investigating drug-related matters).

addition to the heightened threat to officer safety, the moment that an individual is placed under formal arrest, he has an increased motive "to take conspicuous, immediate steps to destroy incriminating evidence." *Cupp* v. *Murphy*, 412 U.S. 291, 296 (1973).

Accordingly, this Court has recognized that, "[w]hen an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape," and "to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction." *Chimel*, 395 U.S. at 762-763. Further, the officer's need to protect himself and to preserve evidence justifies a search of the area within the arrestee's "immediate control," which the Court has defined as "the area from within which [the arrestee] might gain possession of a weapon or destructible evidence." *Id.* at 763. Because "potential dangers lurk[] in all custodial arrests," *United States* v. *Chadwick*, 433 U.S. 1, 14-15 (1977), the validity of a search incident to arrest "does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found." *Robinson*, 414 U.S. at 235. Rather, "[i]t is *the fact of the lawful arrest* which establishes the authority to search." *Ibid.* (emphasis added).

2. In *New York* v. *Belton*, *supra*, this Court applied those principles and defined the permissible scope of a search incident to the custodial arrest of someone who has just occupied an automobile. *Belton* arose when a

state trooper stopped a car for speeding and arrested the occupants of the vehicle for possession of marijuana. The officer ordered the occupants out of the car and placed them under arrest. See 453 U.S. at 455-456. After "patt[ing] down" the arrestees and separating them, the officer searched the passenger compartment of the car and discovered cocaine. See *id.* at 456. The state courts suppressed the evidence found during the search on the ground that, when the search took place, "there [was] no longer any danger that the arrestee or a confederate might gain access to the article." *Ibid.* This Court reversed.

The Court began its Fourth Amendment analysis with the principle that "a lawful custodial arrest creates a situation which justifies the contemporaneous search without a warrant of the person arrested and of the immediately surrounding area." *Belton*, 453 U.S. at 457. The Court then explained that courts had struggled in applying the search-incident-to-arrest doctrine to the recurring question presented in *Belton*, namely, "whether, in the course of a search incident to the lawful custodial arrest of the occupants of an automobile, police may search inside the automobile *after the arrestees are no longer in it.*" *Id.* at 459 (emphasis added). As the Court recognized, the lower courts were in "disarray" on that issue and had "found no workable definition of 'the area within the immediate control of the arrestee' when that area arguably includes the interior of an automobile and the arrestee is its recent occupant." *Id.* at 459 n.1, 460.

The Court stated that "[a] single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Belton*, 453 U.S. at 458. "[T]o

establish the workable rule [that] this category of cases requires," the Court adopted "the generalization that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m].'" *Id.* at 460 (quoting *Chimel*, 395 U.S. at 763). Based on that generalization, the Court held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Ibid.* (footnotes omitted).

In *Belton*, the Court emphasized that this rule, "while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found." 453 U.S. at 461 (quoting *Robinson*, 414 U.S. at 235). If the arrest is lawful, then the "search [of the vehicle] incident to the arrest requires no additional justification." *Ibid.* (same). In subsequent cases, this Court has specifically recognized the "bright-line" nature of *Belton*'s search-incident-to-arrest rule. *Florida* v. *Thomas*, 532 U.S. 774, 776 (2001); see also *Michigan* v. *Long*, 463 U.S. 1032, 1049 n.14 (1983).[5]

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[5] As Justice Powell explained in his opinion concurring in the judgment of *Robbins* v. *California*, 453 U.S. 420 (1981), which was decided the same day as *Belton*, the *Belton* rule is also supported by the diminished expectation of privacy that an individual has in the circumstances giving rise to its application:

> *Belton* trades marginal privacy of containers within the passenger area of an automobile for protection of the officer and of destructible evidence. The balance of these interests strongly favors the Court's rule. The occupants of an automobile enjoy

3. *Belton* explicitly applies to an individual, like petitioner, who has already exited a car before he is arrested—*i.e.*, not just to the occupant but to the "recent occupant" of a car. 453 U.S. at 460. The facts of *Belton* underscore the point: Roger Belton and his companions had exited their vehicle before they were arrested and the vehicle was searched. See *id.* at 462-463 ("The jacket was located inside the passenger compartment of the car in which [Belton] had been a passenger just before he was arrested"); see also 3 Wayne R. LaFave, *Search and Seizure* § 7.1(b) at 437 & n.26 (3d ed. 1996 & Supp. 2004) (LaFave) ("*Belton* applies whenever the person arrested was * * * the driver of or a passenger in the vehicle *just before* the arrest.") (emphasis added; collecting cases).

Petitioner argues (Br. 19) that the *Belton* Court's use of the term "recent occupant" was "a lone passing reference." See also *id.* at 8. But the Court's reference to "recent occupant[s]" was consistent with its description of the category of cases that gave rise to *Belton*, *i.e.*, cases in which police "search inside the automobile *after the arrestees are no longer in it*," 453 U.S. at 459 (emphasis added), as well as, as noted with the facts in *Belton*. Furthermore, Justice Brennan's dissenting opinion highlighted the significance of the Court's reference to "recent occupants." See *id.* at 463 ("The

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only a limited expectation of privacy in the interior of the automobile itself. This limited interest is diminished further when the occupants are placed under custodial arrest.

Id. at 431 (citations omitted). Cf. *United States* v. *Edwards*, 415 U.S. 800, 808-809 (1974) ("While the legal arrest of a person should not destroy the privacy of his premises, it does—for at least a reasonable time and to a reasonable extent—take his own privacy out of the realm of protection from police interest in weapons, means of escape, and evidence.").

Court today turns its back on the product of [the *Chimel*] analysis, formulating an arbitrary 'bright-line' rule applicable to *'recent' occupants* of automobiles that fails to reflect *Chimel*'s underlying policy justifications.") (emphasis added); see *id.* at 466 (The Court "adopts a fiction—that the interior of a car is *always* within the immediate control of the arrestee who has *recently* been in the car.") (second emphasis added); *id.* at 466-467 (emphasizing that Belton and his companions were not arrested until "*after* they had been removed from the car") (emphasis in original).

The application of *Belton* to "recent occupants" is the only rule that makes sense from the standpoint of officers in the field. The vast majority of arrests that take place in the *Belton* context occur "after the arrestees are no longer in [the car]." *Belton*, 453 U.S. at 459. That is a common-sense practice. Police officers face an "inordinate risk" when "approach[ing] a person seated in an automobile" and, as a result, often order occupants out of the car when conducting an investigation that may lead to an arrest. *Pennsylvania* v. *Mimms*, 434 U.S. 106, 110 (1977) (per curiam) (officer may, without particularized justification, order a driver out of the car after stopping vehicle); see *Maryland* v. *Wilson*, 519 U.S. 408, 414 (1997) (rule of *Mimms* extends to passengers). It is invariably safer and more efficient for an officer to search the vehicle while an arrestee is outside it. See LaFave § 7.1(a) at 435 n.15 ("fairly standard practice" is to remove an arrestee before searching the vehicle he occupied).

Given that *Belton* explicitly applies to individuals who are not arrested until *after* they have exited the car, petitioner's reliance (Br. 15, 31) on *Vale* v. *Louisiana*, 399 U.S. 30 (1970), is misplaced. In *Vale*, the Court stated that, under *Chimel*, "[i]f a search of a

house is to be upheld as incident to an arrest, that arrest must take place *inside* the house, not somewhere outside." *Id.* at 33-34 (citation omitted; emphasis in original). This Court, however, has never extended that principle to the unique and different automobile context of *Belton* and, if it did, little if anything would be left of *Belton*'s search-incident-to-arrest rule. As discussed, in the vast majority of instances in which the *Belton* rule has been applied—including in *Belton* itself—the individual is *outside* the car when he is arrested.

Both doctrinal and practical considerations support the conclusion that the reasoning of *Vale* does not apply to *Belton*. As a doctrinal matter, the fact that *Belton* is not limited to arrests that take place while an individual is still inside the vehicle is consistent with the unique considerations that the Court dealt with in *Belton* in attempting to establish a "workable rule" for the "particular and problematic context" present in *Belton*. 453 U.S. at 460 & n.3. Moreover, as a practical matter, in the typical case it is likely to be easier for an arrestee to lunge for a weapon or evidence in "the relatively narrow compass of the passenger compartment of an *automobile*" he has just occupied, *id.* at 460 (emphasis added), than it may be to retrieve a weapon or evidence hidden somewhere inside the comparatively spacious areas of a *house* he has just occupied.

B. *Belton*'s Bright-Line Rule Applies Without Regard To Whether An Arrestee Initially Exited His Vehicle Voluntarily Or At The Direction Of Police

The court of appeals rejected petitioner's argument that "*Belton*'s 'bright line' rule 'is limited to situations in which the officer initiates contact with the occupant of a vehicle while that person remains inside the

vehicle.'" J.A. 70 (quoting *Thomas*, 532 U.S. at 776). For several reasons, that conclusion is correct.

1. *The Custodial Arrest, And Not The Initiation Of Police Contact, Triggers The* Belton *Rule*

Belton, along with the search-incident-to-arrest cases on which the Court relied in *Belton*, makes clear that the custodial arrest gives rise to the authority to search. See *Belton*, 453 U.S. at 461 ("A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification."). See also, *e.g.*, *United States* v. *Edwards*, 415 U.S. 800, 802-803 (1974); *Chimel*, 395 U.S. at 762-763; *Preston* v. *United States*, 376 U.S. 364, 367 (1964). As explained in Part A, *supra*, that conclusion follows from the potential dangers inherent in every custodial arrest. Those dangers arise as soon as a recent occupant of a vehicle is placed under arrest—regardless of whether the individual initially got out of the vehicle voluntarily or at the direction of police.

This Court's decision in *Michigan* v. *Long*, *supra*, illustrates that the application of *Belton* turns on the arrest of an individual who has recently occupied a car, and not whether police initiate contact with an individual while he is inside a car. In *Long*, police officers saw a car swerve into a ditch. When they stopped to investigate, the driver of the car, "the only occupant of the automobile, met the deputies at the rear of the car." 463 U.S. at 1035. The officers issued the driver a ticket, but did not arrest him. The question in *Long* was whether the officers conducted a lawful *Terry*-type search of the passenger compartment of the car. At the outset, however, the Court observed that "[i]t is clear * * * that if the officers had arrested [the driver],"

instead of simply issuing him a ticket, "they could have searched the passenger compartment" under *Belton*. *Id.* at 1035 n.1. As the Court explained, "*Belton* clearly authorizes [an automobile] search *whenever* officers effect a custodial arrest." *Id.* at 1049 n.14 (emphasis added). That was true in *Long* even though the police did not pull Long's car over, order him out of the car, or approach him until *after* he had exited his car.

Knowles v. *Iowa*, 525 U.S. 113 (1998), reinforces the conclusion that the arrest is the pivotal event under *Belton*. In that case, the Court held that a police officer may not conduct a warrantless search of a vehicle incident to a traffic citation. The Court explained that "[t]he threat to officer safety from issuing a traffic citation * * * is a good deal less than in the case of a custodial arrest," and that "the concern for destruction or loss of evidence is not present at all" in the case of a citation. *Id.* at 117, 119. At the same time, however, the Court reaffirmed—specifically pointing to *Belton*—that where, as here, there *is* a "custodial arrest," police officers may "conduct a full search of the passenger compartment" of a car in order "to search for weapons and protect themselves from danger." *Id.* at 117, 118 (citing *Belton*, 453 U.S. at 460). Unlike the defendant in *Knowles*, petitioner was subjected to a custodial arrest.

2. *An Initiation-Of-Contact Limitation Has No Support In The Rationales Underlying The Search-Incident-To-Arrest Doctrine*

A rule limiting the application of *Belton* to situations in which the officer initiates contact with the occupant of a vehicle while he remains inside the vehicle is not supported by either of the "historical rationales for the search incident to arrest doctrine." J.A. 72. The likelihood an arrestee will lunge for a weapon contained

in a vehicle that he has recently occupied does not fluctuate based on the reason that he exited the vehicle. "The danger to the police officer *flows from the fact of the arrest*, and its attendant proximity, stress, and uncertainty." *Robinson*, 414 U.S. at 234 n.5 (emphasis added); see *Washington* v. *Chrisman*, 455 U.S. 1, 7 (1982) ("Every arrest must be presumed to present a risk of danger to the arresting officer."). Thus, regardless of whether an individual exits his vehicle voluntarily or on police direction, "the 'bright line' that [this Court] drew in *Belton* clearly authorizes [a search of the car] *whenever* officers effect a custodial arrest." *Long*, 463 U.S. at 1049 n.14 (emphasis added).

So too, the moment that a suspect is placed under arrest, he has an increased motive to conceal or destroy incriminating evidence. See *Belton*, 453 U.S. at 457; *Chimel*, 395 U.S. at 763; see also LaFave § 5.2(c) at 78. The likelihood that an arrestee will attempt to destroy evidence in a car—and the officer's interest in preventing such efforts—does not vary based on whether an arrestee got out of his car of his own volition or upon an officer's bidding. And, as this Court has stated, the need to preserve the integrity of such evidence following the arrest "justifies an 'automatic' search" under *Belton*. *Long*, 463 U.S. at 1049 n.14; see also *Glasco* v. *Commonwealth*, 513 S.E.2d 137, 142 (Va. 1999) ("[A] knowledgeable suspect has the same motive and opportunity to destroy evidence or obtain a weapon as the arrestee with whom a police officer has initiated contact.").

In *State* v. *Dean*, 76 P.3d 429 (2003), the Arizona Supreme Court recently explained the analytical flaws in limiting *Belton* based on whether the police initiate contact with an arrestee before, or after, he exits the car. The court stated:

> The analytical approach * * * under which the applicability of the *Belton* rule turns entirely on whether the police initiated contact with the arrestee while he was still in the vehicle * * * is not supported by the rationale of either *Belton* or *Chimel*. The search incident to arrest exception explicated in *Belton* and *Chimel* was designed to protect officer safety and avoid the destruction of evidence. A suspect arrested next to a vehicle presents the same threat to officer safety and the same potential for destruction of evidence whether or not he was alerted prior to arrest of the police's interest in him. * * * It makes no sense to have two different rules applicable to arrests occurring in what is for all relevant intents and purposes the same situation.

Id. at 436.

This case—which has all the hallmarks of a classic *Belton* encounter—illustrates the arbitrariness of petitioner's initiation-of-contact rule. Officer Nichols first observed petitioner while he was driving his car along Sewells Point Road, and intended to conduct a traffic stop of petitioner's car after he determined that it did not match the description of the registered vehicle. J.A. 62. Petitioner parked and got out of his car before Officer Nichols was able to initiate contact with him, but Officer Nichols met petitioner "*within moments*" after he exited his vehicle, in essentially the same vicinity of the car that petitioner might have occupied if he had been ordered out of the car. The fact that petitioner exited the car voluntarily, rather than on police direction, was immaterial to the encounter that followed. Likewise, the justification for searching petitioner's car pursuant to *Belton* did not materialize until

Officer Nichols had developed probable cause and placed petitioner under custodial arrest.

The rationales underlying *Belton* are squarely implicated by this case. When he was met by Officer Nichols moments after he exited his car, petitioner acted "very nervous and jittery." J.A. 42. Petitioner's behavior caused Officer Nichols to be concerned for his safety and request consent to conduct a pat-down search. After the pat-down search, Officer Nichols had even more cause for concern—petitioner had both marijuana and crack cocaine on his person. *Ibid.* At the moment he placed petitioner under custodial arrest, the situation became even more volatile and potentially dangerous for Officer Nichols—who was on duty by himself—given the unique risks inherent in every custodial arrest, not to mention a drug-related arrest like petitioner's. See p. 11 & note 4, *supra*. A search of petitioner's vehicle revealed a loaded semiautomatic gun under the front seat of petitioner's car—which, as the court of appeals stated, was "'within [petitioner's] immediate control at the beginning of his encounter with' Officer Nichols." J.A. 74.

The fact that petitioner exited the vehicle voluntarily, rather than on police direction, in no way altered the risks that Officer Nichols faced when he met petitioner immediately after he exited his car. Nor did that fact in any way diminish petitioner's incentive to attempt to get back into the car to seize or try to conceal his gun once he was arrested.

3. *An Initiation-Of-Contact Limitation Would Needlessly Complicate* Belton*'s Bright-Line Rule*

Petitioner's initiation-of-contact rule also would needlessly blur the bright line established by *Belton*. In *Belton*, the Court emphasized the need to provide

police officers with a clear, easily administered rule for the dangerous and recurring situation involving the arrest of the recent occupant of a vehicle. 453 U.S. at 458. As the Court elaborated in *Belton*, "[a] highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be 'literally impossible of application by the officer in the field.'" *Ibid.* Subjecting *Belton* to a case-by-case determination whether an individual exited a vehicle voluntarily or on police direction would introduce the sort of "subtle nuances and hairline distinctions" that *Belton* sought to foreclose.

Although petitioner attempts to downplay the line-drawing inherent in an initiation-of-contact limitation on *Belton*, such a rule could require law enforcement personnel to make a variety of ad hoc determinations—subject to second-guessing by a court—in the limited time that they have to assess the situation after arresting the recent occupant of a vehicle. *Belton*, 453 U.S. at 458. For example, in deciding whether a *Belton* search is authorized, an officer might have to ascertain (1) whether the arrestee was aware of the police when he got out of the car, a determination that may depend on whether the police are in uniform or a marked squad car, police lights or sirens have been activated, or the arrestee was impaired in a manner that could have affected his awareness of the police; (2) whether, if the arrestee *appeared* to get out of the car voluntarily, the arrestee nevertheless did so to avoid the application of *Belton*; and (3) whether an officer sufficiently "signal[ed] confrontation" (J.A. 65) with an arrestee while he was in the car, such that the arrestee got out

of the car because of the officer's contact as opposed to another reason.

The subjective nature and potential complexity of that determination is illustrated by the facts of the *Gant* case, which this Court vacated and remanded last fall in light of an intervening decision of the Arizona Supreme Court rejecting an initiation-of-contact limitation on *Belton*. *State* v. *Gant*, 43 P.3d 188 (Ariz. Ct. App. 2002), vacated and remanded, 124 S. Ct. 461 (2003), and superseded by *State* v. *Dean*, 79 P.3d 429 (Ariz. 2003). In *Gant*, the police "shin[ed] a flashlight into Gant's vehicle" as they approached the car, but the Arizona court of appeals nonetheless concluded that the record failed to show "that the police attempted to initiate contact with Gant while he was still in his vehicle or that he had attempted to evade contact with the police by exiting his vehicle." 43 P.3d at 245; see *ibid.* ("[W]e do not believe that, by shining a flashlight into Gant's vehicle, the officer necessarily initiated contact with him"; discussing other variables complicating the determination whether *Belton* applied under the court of appeals's initiation-of-contact approach).[6]

In addition, because an initiation-of-contact limitation creates an incentive for suspects to abandon their vehicles before a police officer may initiate contact with them, courts that have adopted that limitation have had

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[6] Petitioner claims (Br. 29) that "there is no subjective component of the contact initiation rule, either as to the officer's or the occupant's intent." But the case law in jurisdictions that have adopted that rule refutes that contention. In *Gant*, for example, the state court of appeals emphasized that "the record does not support a finding that Gant was or should have been aware of anyone's approach as he exited his vehicle," and further stated that it was "unfortunate that the record" did not contain the "witnesses' [own] testimony." 43 P.3d at 245.

to make an exception—which petitioner himself appears to endorse (Br. 35)—that further complicates the application of *Belton*. As the Arizona court of appeals stated in *Gant*: "[W]e emphasize that, when police attempt to initiate contact by either confronting or signaling confrontation, a vehicle's occupant cannot avoid *Belton*'s application by exiting the vehicle when officers are seen or approach." 43 P.3d at 192-193; see also *Thomas* v. *State*, 761 So. 2d 1010, 1013-1014 (Fla. 1999) ("We must caution, however, that * * * [t]he occupants of a vehicle cannot avoid the consequences of *Belton* merely by stepping outside of the vehicle as the officers approach."), cert. dismissed, 532 U.S. 774 (2001). The officer in the field has enough on his mind in the typical *Belton* encounter without having to engage in a case-by-case inquiry into the particular *reason* that a suspect exited his vehicle.

4. *An Initiation-Of-Contact Limitation Is Likely To Compromise Police Safety And Surveillance Activities*

As the court of appeals concluded, limiting *Belton* to situations in which police initiate contact with a suspect while he is still inside a vehicle "would raise serious safety concerns for law enforcement personnel" (J.A. 72) by increasing the risks inherent in an already highly volatile encounter, in direct contravention of *Belton*'s officer-safety rationale. As the court of appeals observed, "when encountering a dangerous suspect, it may often be much safer for officers to wait until the suspect has exited a vehicle before signaling their presence, thereby depriving the suspect of any weapons he may have in his vehicle, the protective cover of the vehicle, and the possibility of using the vehicle itself as either a weapon or a means of flight." *Ibid.*

Moreover, as the court of appeals also recognized, adopting an initiation-of-contact limitation on *Belton* creates an incentive for *suspects* to jump out of their vehicles before they are ordered to do so by police in an attempt to render their vehicles "search proof" under *Belton*. J.A. 73; see *Glasco*, 513 S.E.2d at 142. At the same time, an initiation-of-contact limitation also could lead *the police* to rush a confrontation with vehicle occupants, in order to ensure that *Belton* will apply in the event that the occupants are arrested. See *State* v. *Wanzek*, 598 N.W.2d 811, 815 (N.D. 1999) ("Police officers should not have to race from their vehicles to the arrestee's vehicle to prevent the arrestee from getting out of the vehicle in order to conduct a valid search."). Either dynamic would paradoxically create a more volatile, and thus less safe, world for officers than the one that existed before *Belton*.

Furthermore, as the court of appeals recognized, in many situations, including undercover operations, it may be undesirable or infeasible for police to announce their presence and initiate contact with an individual before the individual gets out of a vehicle. See J.A. 72 ("[W]e can certainly imagine the hesitancy of an officer to activate his lights and sirens if the officer encounters the arrestee while conducting undercover surveillance in an area."); cf. *Shipley* v. *California*, 395 U.S. 818, 819 (1969) (per curiam). That may be particularly true where police are on the lookout for a particular suspect, whose identity may not be known or discernable until the suspect exits a vehicle, see, *e.g.*, *United States* v. *Snook*, 88 F.3d 605, 606 (8th Cir. 1996), or where police do not develop suspicion to investigate until an individual gets out of a vehicle, such as where officers observe an individual get out of a car brandishing a firearm or carrying contraband.

The typical *Belton* encounter is an "especially hazardous" event for police. *Long*, 463 U.S. at 1049. As the court of appeals observed, "[m]andating that officers alert a suspect to their presence before he sheds the protective confines of his vehicle would force officers to choose between forfeiting the opportunity to preserve evidence for later use at trial and increasing the risk to their own lives and the lives of others." J.A. 72. Nor has petitioner supplied any reason for the Court to subject police officers to that dilemma in order to ensure that *Belton* will apply if the recent occupant of a car is arrested.

C. *Belton*'s Built-In Limitations Are Straightforward And Workable And Are Far Superior To The Arbitrary Initiation-Of-Contact Rule Advanced By Petitioner

Although petitioner's initiation-of-contact limitation has no footing either in *Belton* or its rationales, petitioner suggests (Br. 21) that the adoption of such a limitation is nevertheless necessary in order to ensure that the *Belton* rule is workable and has a "logical stopping point." See also *id.* at 9-11, 24-25. That contention is also without merit.

1. *An Initiation-Of-Contact Rule Is Not Necessary To Confine* Belton *To Its Natural Reach*

Belton has built-in limitations that have proven to be clear, workable, and sound in the mine run of cases.

a. First, *Belton* applies only when the arrestee is the vehicle's "recent occupant." 453 U.S. at 460. In most cases in which the question presented has arisen—including this one—there is no reasonable doubt that the arrestee is a recent occupant because the police see the individual exit the vehicle and confront him moments later in essentially the same vicinity that the suspect might have occupied if he had been ordered out

of the car. See J.A. 73-74; *Thomas*, 532 U.S. at 777 (police officer met suspect alongside vehicle right after officer saw him exit the car); *United States* v. *Snook*, 88 F.3d 605, 606 (8th Cir. 1996) (as officer arrived on the scene, "he immediately saw [the defendant], who was just stepping out of his vehicle," and confronted him); *United States* v. *Willis*, 37 F.3d 313, 317 (7th Cir. 1994) (officer saw arrestee sitting in vehicle and then squatting at rear of car and arrested him alongside vehicle); *Gant*, 43 P.3d at 190 ("as the officer was walking toward the vehicle, Mr. Gant got out of the vehicle and started walking toward the officer when the officer called him by name" and met him); *Glasco*, 513 S.E.2d at 435-436 (police officer saw suspect park car and get out and met him moments later); *State* v. *Wanzek*, 598 N.W.2d at 815-816 (suspect exited car immediately before arrest and met officer at rear of vehicle); *People* v. *Bosnak*, 633 N.E.2d 1322, 1326-1327 (Ill. App. Ct. 1994) (officer witnessed suspect driving erratically, saw him exit car, and confronted him moments later); see also *Long*, 463 U.S. at 1035-1036, discussed at pp. 17-18, *supra*.

Whether a suspect exits his vehicle voluntarily or on police direction, there does come a point at which the suspect can no longer be reasonably regarded as a "recent occupant" of the vehicle—*i.e.*, because of the time that has elapsed or distance that he has covered since he exited his car. Although most courts have had little difficulty in concluding that *Belton* does not apply when a suspect has moved hundreds of feet from a car or has not occupied a car for a significant period of time before he was arrested, courts have reached somewhat differing results in closer cases.[7] But the fact that

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[7] See, *e.g.*, *United States* v. *Edwards*, 242 F.3d 928, 938 (10th Cir. 2001) (*Belton* does not apply where defendant "was not ar-

lower courts have reached differing results in a minority of cases in applying *Belton* to individuals who have exited a vehicle provides no reason for arbitrarily limiting *Belton* to "recent occupants" who were *ordered* out of their car by police before they were arrested.

Moreover, if this Court affirms the court of appeals's judgment in this case, it will remove any doubt as to the application of *Belton* to the most common and therefore most important situation in which the question presented has arisen—*i.e.*, where the police see the arrestee exit the vehicle and confront him moments later. See *Wyoming* v. *Houghton*, 526 U.S. 295, 305 (1999) ("[T]he balancing of [Fourth Amendment] interests must be conducted with an eye to the generality of cases."); see also *United States* v. *Alvarez-Sanchez*, 511 U.S. 350, 359-360 (1994); *Albright* v. *Oliver*, 510 U.S. 266, 291 (1994) (Souter, J., concurring in judgment). As the court of appeals explained, "[t]he conceded close proximity, both temporally and spatially, of [petitioner] and his car at the time of his arrest provides adequate assurance that application of the *Belton* rule to cases like this one does not render that rule limitless." J.A. 74; see Part D, *infra*. Recognizing that *Belton* applies in such circumstances therefore will not expand *Belton* in the limitless fashion asserted by petitioner.

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rested in or near the car, but 100-150 feet away from the car"); *United States* v. *Strahan*, 984 F.2d 155, 159 (6th Cir. 1993) (*Belton* does not apply where arrestee was "approximately thirty feet from his vehicle when arrested"); *Dean*, 76 P.3d at 437 (arrestee was not "recent occupant" under *Belton* where "[h]e had not occupied the vehicle for some two and one-half hours," and was found hiding in the attic of a nearby house); *State* v. *Porter*, 6 P.3d 1245, 1249 (Wash. Ct. App. 2000) (*Belton* does not apply where individual was arrested 300 feet from vehicle).

Police officers routinely are required to make common sense judgments based on their past experiences and knowledge in the limited time that they have to evaluate a set of unfolding circumstances in the field. See *Belton*, 453 U.S. at 458-459. A decision by this Court in this case recognizing that an arrestee is a recent occupant for purposes of *Belton* where, as here, the police see the individual exit a vehicle and confront him moments later not only would be fully consistent with *Belton* and its rationales, but would establish a "readily applicable [standard] by the police in the context of the law enforcement activities in which they are engaged," *id.* at 458, and afford police the flexibility necessary in this context for effective and safe police work. See *Robbins* v. *California*, 453 U.S. 420, 431 (1981) (Powell, J., concurring in judgment) (*Belton* recognizes that "practical necessity requires that we allow an officer in these circumstances to secure thoroughly the automobile without requiring him in haste and under pressure to make close calculations about danger to himself or the vulnerability of evidence."); see also *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 347 (2001) ("Often enough, the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made.").[8]

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[8] In a similar vein, Professor LaFave, who has been "critical" of the bright-line rule established by *Belton* in general, 3 LaFave § 7.1(c) at 457, has observed that "it is at least debatable whether a line drawn in terms of whether the officer had previously 'signal[ed]' confrontation' or 'initiated contact' in some way provides a more workable test [than *Belton*] (as well as whether a

b. Second, *Belton* requires that the search of the vehicle be undertaken as "a contemporaneous incident of th[e] arrest." 453 U.S. at 460. As the District of Columbia Circuit has explained, a search generally meets the contemporaneous-incident standard whenever "it is an integral part of a lawful custodial arrest process," such that the search and arrest are fairly regarded as "one continuous event." *United States* v. *Abdul-Saboor*, 85 F.3d 664, 668, 669 (D.C. Cir. 1996). Like the "recent occupant" limit, *Belton*'s "contemporaneous incident" requirement affords the officer in the field flexibility to determine the most appropriate —and safe—manner in which to conduct a vehicle search under the circumstances at hand. In addition, just as is true for the "recent occupant" limitation, while there may be outlying cases in which it is debatable whether a vehicle search is a "contemporaneous incident" to an arrest, in the vast majority of cases that determination is straightforward.

Most courts have concluded that *Belton* does not authorize the search of a vehicle as a "contemporaneous incident" to the arrest of its recent occupant if the arrestee or his vehicle has been removed from the scene of the arrest before the search is conducted. See, *e.g.*, *United States* v. *Wells*, 347 F.3d 280, 287 (8th Cir. 2003); *United States* v. *Lugo*, 978 F.2d 631, 634-635 (10th Cir. 1992). That understanding is consistent with this Court's pre-*Belton* case law. See *Dyke* v. *Taylor Implement Mfg. Co.*, 391 U.S. 216, 220 (1968) (search of arrestee's car was "too remote in time or place to [be] incidental to the arrest," where search did not occur

premium should be placed on a driver's ability to exit the vehicle before such a signal or contact can be effectuated)." *Id.* § 7.1 at 119 (Supp. 2004).

until arrestee was in custody inside the courthouse and his car had been moved by police from the site of the arrest to the street outside the courthouse); *Preston*, 376 U.S. at 368 (search of arrestee's car was not incident to arrest when search was conducted after car had been towed to a garage).[9]

2. *Petitioner's Alternative "Reaching Distance" Argument Was Waived And, In Any Event, Is Unsound*

Petitioner alternatively argues (Br. 35) that, if this Court declines to adopt an initiation-of-contact limitation on *Belton*, "the Court should find that a person is a 'recent occupant' of a car only when that person, having just exited the car, remains within reaching distance of it at the time of his arrest." See *id.* at 10. The Court should not so find.

[9] After a vehicle has been removed from the scene of an arrest, a search of the vehicle may still be reasonable and thus lawful under the Fourth Amendment, even if the search would not be warranted as an incident to the arrest. See *United States* v. *Johns*, 469 U.S. 478, 487 (1985). This Court has recognized, for example, that the Fourth Amendment permits police to inventory the contents of impounded vehicles under standardized procedures at a time and place removed from an arrest. See *Colorado* v. *Bertine*, 479 U.S. 367, 371-372 (1987); *South Dakota* v. *Opperman*, 428 U.S. 364 (1976). Even when such standardized procedures are in place, however, the ability of police to conduct an inventory search once a vehicle is removed from the scene of the arrest of the vehicle's recent occupant does not address the officer-safety and destruction-of-evidence concerns that make it reasonable for police to search the vehicle contemporaneously with the arrest under *Belton*. In this case, the government argued that the search of petitioner's vehicle was also lawful as an inventory search. The court of appeals did not need to reach that question and it is not presented here. See J.A. 75; note 2, *supra*.

a. Petitioner's "reaching distance" argument was not raised below or in the petition for certiorari, and therefore has been waived. As discussed above, the "sole contention" that petitioner made in the court of appeals is that the search of his automobile was unlawful because Officer Nichols did not initiate contact with him "while [he] was still in his vehicle." J.A. 64-65. Petitioner conceded that, if Officer Nichols had initiated contact with petitioner while he "was still in his vehicle," then "following [petitioner's] arrest for having the narcotics, a subsequent search of [petitioner's] automobile's passenger compartment would have been reasonable and within the scope of *Belton*." Pet. C.A. Br. 13.

Furthermore, in his petition for certiorari, petitioner did not argue that *Belton* only applies if he was within "reaching distance" of his car at the time of his arrest. Instead, he limited his petition solely to the question whether "*Belton* is confined to situations in which the police initiate contact with the occupant of a vehicle while that person is in the vehicle." Pet. i; see Pet. 5-6. In his brief on the merits, petitioner attempts to expand the scope of the question on which this Court granted certiorari to include the alternative argument discussed above. Compare Pet. i, with Pet. Br. i. That belated effort to recast the question presented in the petition for certiorari, and challenge the search on the basis of an argument not pressed or considered below, is not permissible under this Court's rules, see Sup. Ct. R. 14.1(a), and is out of step with the Court's usual practice, see *Peralta* v. *Heights Med. Ctr., Inc.*, 485 U.S. 80, 86 (1988) (The Court's customary practice is to "deal with the case as it came here and affirm or reverse based on the ground relied on below.").

b. In any event, neither *Belton* nor the considerations on which it rests supports petitioner's alternative

argument that the search of a vehicle incident to the arrest of its recent occupant is not authorized under *Belton* unless the government can show that an individual who "has just gotten out of [a] car * * * is still within reaching distance of it at the time of arrest." Pet. Br. 10. Such a requirement is inconsistent with the "generalization" on which *Belton* rests, 453 U.S. at 460, and, if adopted, would all but eviscerate *Belton*'s bright-line rule.

As discussed above, in order "to establish the workable rule [that] this category of cases requires," the Court in *Belton* adopted the "generalization" that the "interior of an automobile" is always within the "immediate control" of an arrestee when "the arrestee is its recent occupant." 453 U.S. at 460 (quoting *Chimel*, 395 U.S. at 763). The Court emphasized that *Belton*'s rule, "while based upon the need to disarm and to discover evidence, does *not* depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found." *Id.* at 461 (quoting *Robinson*, 414 U.S. at 235; emphasis added). Thus, in *Belton*, the Court did not engage in any particularized examination of the record to determine whether Roger Belton was within "reaching distance" of the car that he had recently occupied at the time of his arrest. Rather, the Court presumed that the passenger compartment of the car was within Belton's "immediate control" because he "had been a passenger [of the car] just before he was arrested." *Id.* at 462; see also *Knowles*, 525 U.S. at 118; p. 13, *supra*.

Subjecting *Belton* to an after-the-fact, case-specific determination whether the recent occupant of a vehicle "is within reaching distance of the car when he was arrested" (Pet. Br. 11) is antithetical to the generalization that this Court drew in *Belton*, not to mention the

Court's emphasis that its ruling did not depend on case-by-case justifications as to the need for the search. Such a limitation on *Belton* would also all but eliminate *Belton*'s bright-line rule—and replace it with *Chimel*'s fact-specific analysis—any time the occupant of a vehicle is arrested after he exits his car (voluntarily or not), which, as discussed above, is the situation in the vast majority of arrests in which *Belton* applies. In other words, adopting petitioner's "reaching distance" requirement would put courts—and police officers—back into the uncertain and hazardous world that existed before *Belton*. See 453 U.S. at 459.

c. For the same reasons that petitioner's alternative argument is not properly before this Court and should be rejected, petitioner errs in suggesting that the court of appeals's decision is deficient because the record contains "no specific findings regarding [petitioner's] distance from the car when Officer Nichols arrested him." Pet. Br. 6; see *id.* at 8, 11, 12, 28-29, 36, 37. Petitioner did not challenge the application of *Belton*, or the legality of the search at issue, based on the lack of such findings in the courts below. More fundamentally, as discussed above, the applicability of *Belton* does not turn on such after-the-fact determinations, and this Court has never suggested that, in order to justify a *Belton* search, the government must prove the precise distance between a suspect and his vehicle at the time of arrest.

D. The Court Of Appeals Correctly Concluded That The Search Of Petitioner's Vehicle Was Valid Under *Belton*

1. Under *Belton*, the search of petitioner's vehicle was a lawful incident to petitioner's arrest. J.A. 73-74. First, at the time of his arrest, petitioner was a "recent occupant" of the vehicle. As explained above, the record "conclusively" establishes that Officer Nichols saw petitioner exit his vehicle and met him "*within moments*" in order to ask him why his vehicle did not match the registered vehicle. J.A. 74 (emphasis in original); see J.A. 42, 46. Thus, like Belton's jacket, petitioner's gun was located inside the passenger compartment of the car that he had occupied "just before he was arrested." *Belton*, 453 U.S. at 462. Second, Officer Nichols searched petitioner's car as "a contemporaneous incident" to petitioner's arrest. *Id.* at 460. Officer Nichols arrested petitioner, put him in his patrol car, and searched petitioner's car as part of one continuous event. J.A. 74. Accordingly, the search at issue falls within *Belton*'s bright-line rule.

2. As the court of appeals noted, petitioner did not challenge the applicability of *Belton* on the ground that he was handcuffed and in the patrol car at the time that his car was searched. See J.A. 74-75 n.2 ("We also note that circuit precedent, *which [petitioner] does not challenge*, permitted Officer Nichols to separate [petitioner] from the vehicle (in this case by handcuffing him and placing him in the patrol car) prior to the search.") (emphasis added). Rather, petitioner acknowledged that "[t]he search of an automobile is generally reasonable even if the defendant has already been removed from the automobile to be searched and is under the control of the officer." Pet. C.A. Br. 12. Accordingly, that issue is not presented here.

In any event, the fact that petitioner was secured in the patrol car at the time of the search does not render *Belton* inapplicable. *Belton* applies only to individuals who are under custodial arrest. In other words, by definition, in cases covered by *Belton*, the liberty of the recent occupant has already been substantially restrained by the time of the search. It is standard

practice for police officers to handcuff an arrestee and put him in a patrol car before conducting a *Belton* search. Thus, lower courts across the country have routinely and virtually unanimously applied *Belton* to situations in which the recent occupant of a car was arrested, handcuffed, and placed in a squad car before his vehicle was searched.[10] The practice of restraining an arrestee on the scene before searching a car that he just occupied is so prevalent that holding that *Belton* does not apply in that setting would, as one court observed, "largely render *Belton* a dead letter." *United States* v. *Wesley*, 293 F.3d 541, 548 (D.C. Cir. 2002).

[10] See, *e.g.*, J.A. 74-75 n.2 (citing *United States* v. *Milton*, 52 F.3d 78, 80 (4th Cir.), cert. denied, 516 U.S. 884 (1995)); *United States* v. *Wesley*, 293 F.3d 541, 545-549 & n.8 (D.C. Cir. 2002) (citing cases); *United States* v. *Humphrey*, 208 F.3d 1190, 1202 (10th Cir. 2000); *United States* v. *McLaughlin*, 170 F.3d 889, 890, 891-892 (9th Cir. 1999); *United States* v. *Sholola*, 124 F.3d 803, 817-818 & n.15 (7th Cir. 1997) (citing cases); *Conrod* v. *Davis*, 120 F.3d 92, 94 (8th Cir. 1997), cert. denied, 523 U.S. 1081 (1998); *United States* v. *Mitchell*, 82 F.3d 146, 152 (7th Cir.), cert. denied, 519 U.S. 856 (1996); *United States* v. *Moorehead*, 57 F.3d 875, 877 (9th Cir. 1995); *United States* v. *Doward*, 41 F.3d 789, 791 (1st Cir. 1994) (citing cases), cert. denied, 514 U.S. 1074 (1995); *United States* v. *Riedesel*, 987 F.2d 1383, 1386, 1388 (8th Cir. 1993); *United States* v. *White*, 871 F.2d 41, 44 (6th Cir. 1989); *United States* v. *Karlin*, 852 F.2d 968, 970-971 (7th Cir. 1988), cert. denied, 489 U.S. 1021 (1989); *People* v. *Daverin*, 967 P.2d 629, 631, 632 (Colo. 1998); *State* v. *Harvill*, 963 P.2d 1157, 1158 (Idaho 1998); *People* v. *Bailey*, 639 N.E.2d 1278, 1281-1282 (Ill. 1994), cert. denied, 513 U.S. 1157 (1995); *United States* v. *Valiant*, 873 F.2d 205, 206 (8th Cir.), cert. denied, 493 U.S. 837 (1989); *State* v. *Hensel*, 417 N.W.2d 849, 852-853 (N.D. 1988); *State* v. *Stroud*, 720 P.2d 436, 438 (Wash. 1986); *State* v. *Fry*, 388 N.W.2d 565, 567 (Wis.), cert. denied, 479 U.S. 989 (1986); see also 2 Wayne R. LaFave et al., *Criminal Procedure* § 3.7(a) at 203 & n.14 (2d ed. 1999) ("[A] search of a vehicle under *Belton* is permissible even after the defendant has been removed from the car, handcuffed and placed in a squad car.") (citing cases).

The ingrained police practice fully comports with *Belton*. In *Belton*, this Court rejected the proposition —advanced by the state court in *Belton* and the dissenters in that case—that, "[w]hen the arrest has been consummated and the arrestee safely taken into custody, the justifications [for a warrantless search] cease to apply," because "at that point there is no possibility that the arrestee could reach weapons or contraband." 453 U.S. at 465-466 (Brennan, J., joined by Marshall, J., dissenting). Thus, as Justice Brennan emphasized in his dissenting opinion, the rationale of *Belton* squarely applies even after a recent occupant has been handcuffed and put in a squad car. See *id.* at 468 ("Under the approach taken today, the result would presumably be the same even if Officer Nicot had handcuffed Belton and his companions in the patrol car before placing them under arrest."); see also *Wesley*, 293 F.3d at 548 ("The dissenters in *Belton* understood the case to establish a flat rule, applicable regardless of the status of the defendants at the time of the search.").[11]

[11] Two of the lower court cases that the Court pointed to in *Belton* to illustrate the need for a "straightforward rule" governing "the proper scope of a search of the interior of an automobile incident to a lawful custodial arrest of its occupants," 453 U.S. at 459 & n.1—*Hinkel* v. *Anchorage*, 618 P.2d 1069, 1069-1070 (Alaska 1980), cert. denied, 450 U.S. 1032 (1981), and *Ulesky* v. *State*, 379 So. 2d 121, 123 (Fla. Dist. Ct. App. 1979)—involved situations in which the arrestee was in the back of the patrol car at the time that the vehicle was searched. Applying *Chimel* v. *California*, *supra*, the court of appeals in *Ulesky* reasoned that "once appellant was placed in the patrol car and thereby separated from her purse [in the vehicle], neither of the justifications for the search incident to arrest exception were present." 379 So. 2d at 126. As the dissenters in *Belton* recognized (453 U.S. at 468), that reasoning,

Furthermore, at least as long as the arrestee remains at the scene of the arrest, the rationales underlying the search-incident-to-arrest doctrine are potentially implicated. Even after individuals are taken into custody, they continue to pose a grave threat to law enforcement personnel. See, *e.g.*, *Plakas* v. *Drinski*, 19 F.3d 1143, 1145 (7th Cir.) (suspect handcuffed in backseat of squad car escaped from squad car and later confronted police), cert. denied, 513 U.S. 820 (1994); *United States* v. *Sanders*, 994 F.2d 200, 210 & n.60 (5th Cir.) (citing incidents in which police officers were slain by handcuffed arrestees), cert. denied, 510 U.S. 955 (1993); *Forge* v. *City of Dallas*, No. 3-03-CV-0256-D, 2003 WL 21149437, at *1 (N.D. Tex. May 19, 2003) (arrestee who was handcuffed and secured with a seatbelt in a locked patrol car "suddenly and without warning * * * slipped out of his handcuffs, released the seat belt latch, opened the locked car door, and tried to escape from custody"); see also *United States* v. *Doward*, 41 F.3d 789, 793 n.5 (1st Cir. 1994) (discussing "the unpredictable developments ultimately confronting" police in *Belton* context, including the possibility that bystanders or unknown confederates in the area may approach the vehicle), cert. denied, 514 U.S. 1074 (1995); see also *id.* at 791-793 & n.1.[12] In addition, as long as a vehicle remains at the

while arguably consistent with *Chimel*'s case-specific analysis, is out of step with the generalization made by the Court in *Belton* in order to provide officers in the field with a "single familiar standard" in this critical context. *Id.* at 458.

[12] In 2001, two officers were killed and 7343 were assaulted while in the process of handling, transporting, or maintaining the custody of prisoners. *Uniform Crime Reports* 32, 93 (2001). In addition, on September 28, 2001, a police officer was killed by a suspect who managed to free himself from his handcuffs, retrieve a handgun, and shoot the officer. *Id.* at 49; see also *Uniform Crime Reports* 49 (1998) (On May 19, 1998, two police officers were killed when a handcuffed suspect in the back seat of their patrol car managed to free himself, retrieve one of the officer's guns, and mortally wound both officers.); *id.* at 50 (officer killed on January 12, 1998, by individual who had been ordered out of his car, when the individual managed to free himself, retrieve a rifle from his car, and mortally wound the officer).

scene of arrest, known or unknown confederates of the arrestee may seek to gain access to weapons or evidence that may be inside the vehicle.

The bright-line *Belton* rule permits officers to protect themselves against the small but nevertheless potentially deadly risk that even after an arrestee is handcuffed and in the squad car, it is possible that a weapon inside the arrestee's car may be used against the officer while the car remains at the scene of the arrest or that evidence inside the car may be retrieved or destroyed. Especially where, as here, an arrest is conducted by a police officer on duty by himself, such protective and reasonable measures may be vital. And, as one court of appeals observed in a similar vein, "it does not make sense to prescribe a constitutional test that is entirely at odds with safe and sensible police procedures." *United States* v. *Mitchell*, 82 F.3d 146, 152 (7th Cir.), cert. denied, 519 U.S. 856 (1996). That is particularly true where, as here, the procedures have been utilized by police across the nation for decades and thus have become accepted as a standard practice.

Accordingly, although the issue is not presented by this case, the fact that petitioner was restrained and in Officer Nichols's patrol car at the time of the search nonetheless provides no basis for second-guessing the application of *Belton* either.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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In The
Supreme Court of the United States

MARCUS THORNTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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INTRODUCTION

In *New York v. Belton*, this Court established a bright-line rule that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." 453 U.S. 454, 460 (1981) (footnotes omitted). In so holding, *Belton* drew on this Court's teachings in *Chimel v. California*, 395 U.S. 752 (1969) – without altering *Chimel*'s "fundamental principles establish[ing] . . . the basic scope of searches incident to lawful custodial arrests" – that the police may search only that area within the immediate control, or reaching distance, of the arrestee. 453 U.S. at 457-58, 460 & n.3; *see Chimel*, 395 U.S. at 763, 766 (limiting scope of searchable area to that area within arrestee's reach).

By its plain terms, then, *Belton* does not apply to the facts of this case: Marcus Thornton had parked and left his car before the police officer even contacted him, let alone arrested him. That is, he was not an "occupant" of the car. Because he was not, he argued below, the search of his car exceeded the scope of *Belton* and of *Chimel*, as the car's interior was not within his immediate control, i.e., reaching distance. The search of the car, therefore, was unreasonable. *See* Pet. Ct. App. Br. 10, 12; Def. Mot. New Trial 4, 6.

The Court of Appeals believed, however, that *Belton* extends to a person associated with and in spatial and temporal "proximity" to a car at the time of his arrest. J.A. 74, 325 F.3d 189, 196 (4th Cir. 2003). Mr. Thornton challenges that expansive reading of *Belton*. The Court of Appeals' proximity approach erases the bright line that *Belton* carefully drew when it limited its holding to

"occupants," and forces courts and officers in the field to ponder vague concepts such as "proximity" and "moments" in deciding whether a search is reasonable.

Perhaps recognizing that the Court of Appeals' approach is amorphous and unworkable, the government attempts to elaborate upon and qualify it. But the government's attempt to salvage the Court of Appeals' approach proves just how amorphous and unworkable it is. In place of *Belton*'s clear and simple rule for "occupant," the government suggests that a search of a car's interior is constitutionally permissible when the police see an arrestee leave his car and "confront him moments later in essentially the same vicinity that the suspect might have occupied if he had been ordered out of the car." Resp. Br. 26-27. Neither the language nor the reasoning of *Belton*'s bright-line rule support this approach. Moreover, because it uses undefined, unfocused, and limitless terms, the approach is unworkable, and therefore unhelpful to citizens, police officers, and judges.

To the extent that the *Belton* bright-line rule needs clarification, the appropriate clarification is that "occupant" means a person occupying a car at the time when an officer initiates contact with him. That person becomes a recent occupant if he leaves the car after contact has been initiated and is thereafter arrested within reaching distance of the car. When contact has been so initiated, an officer may search the car incident to arresting the occupant. As such, the contact initiation rule is fully consistent with the facts of *Belton*, in which contact was made while the defendant was still in the car. And the contact initiation rule focuses, as a bright-line rule should, on facts easily and objectively determinable in both the field and the courtroom.

Another alternative that is both fully consistent with *Belton* and easier to apply than the approach of the Court of Appeals (whether qualified as the government suggests or not) is a limited proximity approach. Under this approach, a person is a recent occupant of a car who, having just left his car, is still within reaching distance of it when arrested. So located, the car is still within his immediate control, as required by *Chimel* and incorporated in *Belton*. Because the search of Mr. Thornton's car did not comport with the *Belton* rule for occupancy, whether expressed as a contact initiation rule, as a limited proximity approach, or even as the government-explained Court of Appeals' proximity approach, that search was unreasonable under the Fourth Amendment.

ARGUMENT

I. THE APPROACH OF THE COURT OF APPEALS IS AN UNSUPPORTED AND UNWORKABLE EXPANSION OF *BELTON*'S BRIGHT-LINE RULE

Belton created a bright-line rule that a search of a car's passenger compartment incident to the arrest of the car's occupant is always reasonable. The *Belton* rule was a categorical application of the principles set forth in *Chimel*. The rule was premised on "the generalization that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or an evidentiary ite[m].'" 453 U.S. at 460 (quoting *Chimel*, 395 U.S. at 763) (alteration in original).

When the arrestee is not an occupant of a car, the likelihood that the car's passenger compartment is within his reaching distance is considerably reduced, if not eliminated altogether. Nonetheless, the proximity approach adopted by the Court of Appeals greatly expands the automatic suspicionless search authorized by *Belton* by allowing such searches when a person is merely in spatial and temporal proximity to the car when confronted by the police, and should be rejected. *See* Pet. Br. 11-27 (explaining flaws in proximity approach).

In attempting to defend the Court of Appeals' proximity approach, the government claims that a search should be automatically allowed when "the police see [an] individual exit [a] car and confront him, moments later in essentially the same vicinity that the suspect might have occupied if he had been ordered out of the car." Resp. Br. 26-27; *see id.* at 20. This amorphous "might have" test is not supported by *Belton*, and points up the difficulties with the Court of Appeals' approach. More importantly, this "might have" test is inherently unworkable: under it, a "person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority." *Belton*, 453 U.S. at 460.

A. Neither the Language Nor the Reasoning of *Belton* Support the Approach of the Court of Appeals

The government claims that the "might have" test it says is incorporated into the Court of Appeals' proximity approach is "built in" to *Belton*. Resp. Br. 26. Quite the opposite is true. By its own terms, *Belton*'s holding was limited to occupants of a car: "[W]e hold that when a policeman has made a lawful custodial arrest of *the*

occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." 453 U.S. at 460 (emphasis added) (footnotes omitted); *accord id.* at 454 (stating question presented).

To make its claim that *Belton* really meant to state a rule for situations other than arrests of car occupants, the government (as did the Court of Appeals) must look away from *Belton*'s holding and focus on the single occurrence of the word "recent" in the opinion. Indeed, the government inaccurately describes *Belton* as holding that "police may search the passenger compartment of a vehicle whenever an 'arrestee is its recent occupant.'" Resp. Br. 8. As stated above, however, that is not what *Belton* held. Moreover, the government's argument ignores the obvious: that the suspects in *Belton* were recent occupants of their car only because they had been stopped by the police while they were in it, and that the police did in fact order them out. 453 U.S. at 455-56. Finally, even if the single reference to "recent occupant" in *Belton* could expand the decision's clear holding, that reference cannot reasonably be read as building into the bright-line, objectively-based occupant rule an exception for those cases in which an officer subjectively believes that he would have searched the car if he might have stopped the car and might have ordered the person out of the car to a place where that person might have been within reaching distance of the passenger compartment.

The "might have" test also ignores *Belton*'s clear language that it was adhering to the principle that this Court established in *Chimel*, namely that the police may search only that area within the immediate control, i.e., reaching distance, of the arrestee. *Belton*, 453 U.S. at 460

& n.3. Applying *Chimel*'s precepts to situations involving cars, *Belton* teaches that the police can search the entire passenger compartment of the car only when they arrest the occupant while that occupant is within reaching distance of the car. A police officer, however, in ordering a person out of a car, will almost certainly order the person to move some distance from the car, to reduce the risk of danger to the officer. That order may place the person outside of reaching distance. A police officer can, and should, protect himself this way. But by ordering the person to move out of reaching distance of the car before arresting him, the officer has obviated the automatic suspicionless search rule created by *Belton*, and therefore cannot rely upon it as the basis for any subsequent search of the car. *See also* Pet. Br. 26.

Consequently, the "might have" test for determining who is a recent occupant of a car finds no support in the reasoning of *Belton*, and therefore does not serve the interests it invokes. The dual rationales of officer safety and evidence preservation, *see* 453 U.S. at 457, provide much less support for that test than they do for the original *Belton* rule. This is clear when *Belton* is read in context. As to officer safety, an officer needs *Belton*'s justification only where he has no reasonable suspicion of any danger to himself – that is, where *Michigan v. Long* does not apply.[1] *See* 463 U.S. 1032 (1983). Similarly, as to evidence preservation, an officer needs *Belton*'s automatic

[1] The government makes much of *Long*'s passing reference to *Belton*, Resp. Br. 17-18, but even assuming that the reference was meant to be more than mere dicta, it does not support the government's test. *See* Pet. Br. 21-23.

search rule only when he does not have probable cause to search the car, that is, where *Carroll v. United States* does not apply. *See* 267 U.S. 132 (1925).

B. The Approach of the Court of Appeals Is Unworkable

The *Belton* Court took care to shape an easily-defined, objectively-determinable "workable" rule that would assist both citizens and officers in understanding the law applicable to a recurring factual situation. 453 U.S. at 460. The Court of Appeals' proximity approach, as qualified by the government's "might have" test, contains at least three vague, undefined, subjective and unworkable terms: "moments," "essentially the same vicinity," and "if he had been ordered out of the car." "Moments" is by definition an unspecified amount of time. *See, e.g., Merriam-Webster's Collegiate Dictionary* 748 (10th ed. 2001) (describing "moment" as "a comparatively brief period of time"). A test defined in "moments" is inherently vague and antithetical to a bright-line rule. The "essentially the same vicinity" component poses an equally perplexing task for the officer in the field. "Vicinity" is a non-specific, open-ended term, subject to interpretation. Modifying "vicinity" with "essentially" only increases the subjectiveness of the description further, and thus increases the practical difficulty of applying the Court of Appeals' approach. Finally, the "if he had been ordered out of the car" component requires the officer to speculate about what the driver would have done had his exit from the car been at the officer's direction.

The undefinable nature of these terms leaves citizens and police officers alike without guidance. Each encounter with a person associated with a car will turn on the

officer's subjective perceptions of how he might have acted if the facts were other than what they are.[2] And those perceptions will necessarily be subject to post hoc reconsiderations. Courts would have to decide (1) whether the officer intended to order the person out of the car (as opposed to simply speak with him through the window, or have a consensual encounter on the street); and (2) if so, where the officer might have intended to have this encounter. It is ironic that the government advocates a test involving post hoc speculation when it criticizes the contact initiation rule for requiring ad hoc determinations by police officers that are "subject to second-guessing by a court." Resp. Br. 22.

The unworkability of the Court of Appeals' proximity approach, particularly as explained by the government, is borne out when it is applied to the facts of this case. Here, the government cannot pinpoint with any degree of specificity where the stop occurred, or how long after Mr. Thornton left his car that it occurred. And the government certainly cannot say, "essentially" or otherwise, whether the stop occurred in the same place it would have occurred had Officer Nichols ordered Mr. Thornton out of his car – or even *if* Officer Nichols would have ordered Mr. Thornton out of his car if the officer had reached him before he left it. In short, even if its own test were applied to this

[2] It is ironic that the government advances an undefinable rule allowing automatic searches when the officer believes he might have been able to search had the facts been different, while at the same time criticizing the contact initiation rule as "subjective." Resp. Br. 22-23. More importantly, as the government's own amici point out in their brief, "police officers' subjective intentions rarely factor into Fourth Amendment analyses." Resp. Amici Br. 20 (citing cases).

case, the government would not be able to carry its burden of proof that the search of Mr. Thornton's car was not unreasonable under the Fourth Amendment.

II. THE GOVERNMENT'S ARGUMENTS AGAINST THE CONTACT INITIATION RULE ARE WITHOUT MERIT

Under the contact initiation rule, a police officer may conduct an automatic search of a car when the officer has initiated contact with the person while he is in the car and the officer subsequently arrests the person while he is either still in the car or within reaching distance of it. In contrast to the approach taken by the government and the Court of Appeals, the contact initiation rule is grounded in *Belton*, is straightforward, and is easy to apply.

The government first erroneously argues that the contact initiation rule has "no foundation" or "support" in *Belton*. Resp. Br. 6, 18. To the contrary, *Belton* is itself a contact initiation case. Belton was in the car when stopped, he was ordered out of the car by the trooper, and he was then arrested by that officer. This Court upheld a search of the car that Belton had occupied. If, as the government contends, *Belton* is a case about "recent occupants," then those recent occupants must be limited to those persons who were in the car at the time the police initiated contact and who were subsequently arrested while within reaching distance of the vehicle.

The government further criticizes the contact initiation rule as being a subjective, ad hoc test, claiming that the rule turns on the arrestee's awareness of the police presence and the arrestee's reasons for leaving the car. Resp. Br. 22-23. This claim has no merit. The contact

initiation rule simply has no subjective component. It turns on whether the officer took some action to initiate contact, not on whether that contact was understood as such by the occupant of the vehicle. If there is a subsequent dispute as to whether contact was in fact initiated, the test would be whether an objectively reasonable person would find that the officer had initiated contact. As such, its focus is on the perspective of a reasonable person, in just the same way as the analogous question of when a seizure occurs. As this Court said of the seizure test in *Michigan v. Chesternut*, its "objective standard – looking to the reasonable man's interpretation of the conduct in question – allows the police to determine *in advance* whether the conduct contemplated will implicate the Fourth Amendment." 486 U.S. 567, 574 (1988) (emphasis added). "This 'reasonable person' standard also ensures that the scope of the Fourth Amendment protection does not vary with the state of mind of the particular individual being approached." *Id.*; *see also United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (seizure test is objective); *California v. Hodari D.*, 499 U.S. 621, 628 (1991) (*Mendenhall* objective test focuses on whether the officer's words and actions would have conveyed seizure to a reasonable person).[3]

[3] To the extent that other courts have arguably included a subjective component in a contact initiation test, neither Mr. Thornton nor this Court are bound by such a formulation. Further, while the government relies on *State v. Gant* to support its claim that the contact initiation rule is subjective, Resp. Br. 23 & n.6, the test announced in that case contained an objective component as well. *See* 43 P.3d 188, 193 (Ariz. Ct. App. 2002) (stating that "the record does not support a finding that Gant was *or should have been* aware of anyone's approach as he exited his vehicle") (emphasis added),

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The contact initiation rule sets a similarly objective, clear standard. A court would merely determine whether a reasonable objective person would find that the officer had signaled contact. As for the officer, at the time of contact, he knows whether he employed overhead lights, high beams, a siren or a loudspeaker, made a clearly audible oral statement, or even used a flashlight to look into the car. All of these actions would meet this objective test. If the occupant exited for any reason after such objective conduct, and was subsequently placed under arrest while within reaching distance of the car, the *Belton* automatic search rule would apply.

By focusing on whether an occupant exits a car voluntarily or at police direction, the government incorrectly characterizes the contact initiation rule as an "exiting" test. *See, e.g.*, Resp. Br. I, 6, 16-17, 19, 20, 21, 27. It does so in another unsuccessful attempt to portray the test as involving subjective considerations. As noted, however, the contact initiation rule asks simply whether an officer objectively signaled contact to the occupant of a car. Once contact is signaled, it is immaterial whether the occupant exits the car afterward. Just as the exit is immaterial, so are the occupant's subjective motives for exiting the car. The government is therefore incorrect when it suggests that an officer would have to evaluate those motives or have to decide whether the "arrestee was impaired in a manner that could have affected his awareness of the police." Resp. Br. 22.

vacated and remanded, 124 S. Ct. 461 (2003), *and superseded by State v. Dean*, 79 P.3d 429 (Ariz. 2003).

The government next argues that the contact initiation rule, while difficult for police officers to apply, will spur criminal suspects to jump out of their cars prematurely to avoid a *Belton* search. Resp. Br. 23-24, 25; *see also* Resp. Amici Br. 22. The contact initiation rule creates no such paradox. Trained officers will be easily able to apply the rule, and, should criminal suspects become aware of the rule, it is likely that jumping out of a car and hurrying away would contribute to reasonable suspicion justifying an investigative stop of them. *See Illinois v. Wardlow*, 528 U.S. 119, 124-25 (2000); *cf. California v. Hodari D.*, 499 U.S. 621, 623 n.1 (1991) ("That it would be unreasonable to stop, for brief inquiry, young men who scatter in panic upon the mere sighting of the police is not self-evident, and arguably contradicts proverbial common sense. *See* Proverbs 28:1 ('The wicked flee when no man pursueth').").

The contact initiation rule will be easier for officers to apply than other non-bright-line rules they must use all the time. Each day, all around this country, police officers must decide on the facts before them and on the spur of the moment whether they have reasonable suspicion to stop and frisk a suspect, reasonable suspicion to search a car for safety purposes, or probable cause to search a car for contraband. *See Terry v. Ohio*, 392 U.S. 1 (1968); *Michigan v. Long*, 463 U.S. 1032 (1983); *Carroll v. United States*, 267 U.S. 132 (1925). These and many other familiar situations require officers to evaluate a number of factors and balance them in mere seconds.[4] By comparison

[4] The government's amici argue that "[p]olice should not be required to memorialize what they intended or attempted to do to get

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to these tests, the contact initiation rule involves no balancing at all.

The government and its amici further complain that the contact initiation rule may compromise officer safety and surveillance activity. Resp. Br. 24-26; Resp. Amici Br. 14-18. Both arguments assume that a contact initiation rule forces officers to take particular actions. But that is not true; nothing about the contact initiation rule would force any action on the police.

For his safety, an officer may choose, as Officer Nichols did in this case, not to initiate contact when a person is in his car. Mr. Thornton acknowledges the wisdom of that action. As this Court has recognized, there can be "inordinate risk" when an officer approaches a person seated in a car. *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977). That risk has been reduced by allowing an officer to order both the driver and any passengers out of a car, *id.* at 111; *Maryland v. Wilson*, 519 U.S. 408 (1997), as well as by *Belton*, which allows an automatic search even when the officer has no reasonable suspicion of any danger.

The officer is free to reduce that risk even further by confronting a person after he has left the car and moved away from it. But by lessening the risk, the officer has also obviated the need for *Belton*'s rule.[5] What the officer

an occupant's attention." Resp. Amici Br. 20. But officers already must memorialize their bases for believing they have reasonable suspicion or probable cause. This situation is no different.

[5] Rejecting the expansion of the automatic suspicionless search rule in these circumstances does not leave a police officer without recourse for searching a car that he believes should be searched. *See* Pet. Br. 34 and cases cited therein.

should not be able to do, however, is to take advantage of the automatic suspicionless search granted under *Belton* after he has eliminated the reasons (officer safety and evidence preservation) for that search by placing the suspect outside of reaching distance from the car.

Similarly, an officer who decides that continued surveillance and investigation are the primary considerations is free to continue that surveillance and investigation. By making that choice he may forego a chance for an automatic suspicionless search, but he is free to make that choice. Further, he retains other options for searching the car. In fact, the longer the undercover officer watches the car, the greater the likelihood that he will develop probable cause to search or seize it. *See Carroll v. United States*, 267 U.S. 132, 149, 155-56 (1925); *Florida v. White*, 526 U.S. 559, 561 (1999).

Belton is undeniably and properly justified by concerns for officer safety and the desire to preserve evidence. *See* 453 U.S. at 457-58. But at some point in both scenarios described above, the danger to the officer becomes so remote, and the search for evidence so attenuated, that the Fourth Amendment, standing as it does as a safeguard against unreasonable intrusions into homes, persons, and effects, must take precedence over an officer's desire for the "free" search that *Belton* bestows. The contact initiation rule provides a clear, simple, and safe means of determining where to draw that line.

III. THE GOVERNMENT'S ARGUMENTS AGAINST AN ALTERNATIVE *CHIMEL*-BASED TEST ARE WITHOUT MERIT

Mr. Thornton argued in his opening brief that if this Court rejects the contact initiation rule as a means of defining who comes within *Belton*'s automatic search rule, it should limit *Belton* to those cases in which a person who, having just left a car, remains within reaching distance of it at the time of arrest. Pet. Br. 10, 35-36 (proffering "limited proximity approach"). The government asserts that Mr. Thornton has waived this alternative argument, and that the argument lacks merit. Both assertions are meritless.

As to the first assertion, Supreme Court Rule 14.1(a) provides that "[t]he statement of any question presented is deemed to comprise every subsidiary question fairly included therein." The government states the question presented in this case as "[w]hether a police officer may search the passenger compartment of an automobile as a contemporaneous incident of the lawful custodial arrest of the vehicle's recent occupant when the arrestee exited the vehicle voluntarily rather than on police direction." Resp. Br. I. The government would answer this question in the affirmative, provided that the officer sees the person leave the vehicle, confronts him within moments, and confronts him in essentially the same place he would have been had he been ordered out of the car. *Id.* at 20, 26-27. Mr. Thornton would answer negatively, unless the officer either initiates contact while the arrestee was in the car (the scenario in *Belton*), or arrested the occupant within reaching distance of it (the rationale behind *Chimel*). Pet. Br. 29-35, 35-36. The government may dispute Mr. Thornton's answer, but it is specious for the government to argue

that its answer is encompassed within its question presented (or as presented in the petition for certiorari), but Mr. Thornton's is not. This is particularly so where, as Mr. Thornton argued below, the search of his car was unlawful because it exceeded the scope of *Belton*, and therefore of *Chimel*, because, as he was no longer an occupant of the car when the police first approached him, the car's interior was not within his immediate control, that is, it was outside of his reaching distance. Pet. Ct. App. Br. 12; Def. Mot. New Trial 6.[6]

[6] The government's waiver argument is curious in light of the considerable time it spends on an issue that is even farther afield: whether an officer may conduct a *Belton* search after having handcuffed the arrestee and secured him in the patrol car. *See* Resp. Br. 35-39. The government argues the point at length, despite its acknowledgment that it was not challenged below, *id.* at 35, and "is not presented by this case," *id.* at 39. In contrast, Mr. Thornton's "limited proximity" argument was made necessary by the ruling of the Fourth Circuit, which used "proximity" as a basis for expanding *Belton* but placed no workable limits on that expansion.

As to the merits of the patrol car issue, the government is correct that Mr. Thornton did not challenge the applicability of *Belton* where the arrestee has been removed from his automobile and placed in a patrol car before the search of his car is conducted. Resp. Br. 35. In that situation, the mere placement in the patrol car on the scene does not rescind *Belton*'s applicability. That is, once *Belton* is triggered by an arrest inside a car or within reaching distance of it, an automatic search of the car is permissible even though the arrestee is later moved to the inside of a police car on the scene. That said, if *Belton* does not apply in the first instance, then a search of the arrestee's car incident to his arrest is impermissible regardless of whether the arrestee has been moved to the inside of a patrol car. *See, e.g., United States v. Edwards*, 242 F.3d 928, 938 (10th Cir. 2001) (finding *Belton* inapplicable, and search pursuant thereto invalid, where the arrest occurred 100-150 feet away from the searched car); *United States v. Parr*, 843 F.2d 1228, 1231 (9th Cir. 1988) (*Belton* search invalid where the defendant was not

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The government's substantive criticisms of the limited proximity approach likewise have no merit. The government first argues that "neither *Belton* nor the considerations on which it rests supports petitioner's alternative argument" and that the limited proximity approach, "if adopted, would all but eviscerate *Belton*'s bright-line rule." Resp. Br. 32-33. To the contrary, *Belton* was clearly based on the assumption that an arrestee *is* in fact within reaching distance of the car of which he was a recent occupant: because the lower courts had "found no workable definition of 'the area within the immediate control of the arrestee' *when that area arguably includes the interior of an automobile* and the arrestee is its recent occupant," this Court had to determine how much of the interior could be searched. *Belton*, 453 U.S. at 460 (emphasis added). If the arrestee is more than reaching distance away from the car, then the car's interior cannot, even "arguably," be within his immediate control. Based on the assumption that an arrestee would be within reaching distance of the car when arrested, the *Belton* Court held that the entire passenger compartment would be deemed to be within the occupant's immediate control.[7]

The government suggests further that the limited proximity approach should not be the test for recent occupancy because police need a clear rule to apply in the

under arrest at the time of the search, but was merely detained in the patrol car).

[7] The limited proximity approach also is consistent with *Michigan v. Long*, 463 U.S. 1032 (1983), in which this Court suggested that the officers in that case would have been authorized to search Long's car had they arrested him for speeding or driving while intoxicated because he was within reaching distance of his car. *See* Pet. Br. 22-23.

field, not one that courts will review after the fact. Resp. Br. 33-34. But "reaching distance" *is* the test in all other search-incident-to-arrest scenarios pursuant to *Chimel*. This test is familiar to police, and, as more than thirty years of application in the field has established, works perfectly well. *See, e.g.*, Phoenix (Ariz.) Police Dep't, Search and Seizure, Operations Order 4.11, § 7.C(1) ("Search[es] beyond the person must be limited to those areas that remain within the reach of the arrestee."); LaCrosse (Wis.) Police Dep't, General Orders Manual, Order 1.11, § VIII.D (limiting scope of search incident to arrest to arrestee's person and "an area within the person's immediate presence"); *id.* § VIII.E ("The area within an arrested person's immediate presence can be defined as that area within lunge, reach, or grasp of the person at the time of the arrest."). For this reason, the government amici's concerns about "unwarranted nuances of proof" are unfounded. Resp. Amici Br. 22. "Reaching distance" is a well-understood concept that is routinely applied by the police and the courts. It is a concept that will prove equally routine in the context of car searches.

CONCLUSION

Belton created a bright-line rule authorizing an automatic suspicionless search of the entire passenger compartment of a car when an occupant of that car has been arrested within reaching distance of the vehicle. It is precisely because that line must remain bright that this Court should not countenance its blurring and expansion by the Court of Appeals. Such an expansion uncages the search-incident-to-arrest exception, allowing it to swallow the rule. Conversely, the contact initiation rule and the

limited proximity approach, both rejected by the Court of Appeals, properly cabin *Belton*'s exception while holding true to *Belton*'s twin rationales, officer safety and evidence preservation. Neither of these rationales are impaired, and indeed, they are enhanced, under the approaches Mr. Thornton advocates. For these reasons, and those stated in Mr. Thornton's opening brief, this Court should reverse the judgment of the Court of Appeals and not allow *Belton* to roam free without restraint.

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No. 03-5165

In The
Supreme Court Of The United States

Marcus Thornton
Petitioner

v.

United States of America
Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OF SHASHANK S. UPADHYE AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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Motion For Leave To File Brief

Amicus is a member in good standing of this Court and moves this Court for leave to file the attached brief in support of neither party. The United States consented but the Petitioner's counsel did not and similarly, did not provide a detailed explanation thereto.

This brief proposes a rule that finally dispenses of the "intent" or "motive" based approach for vehicle searches putatively present under the *Chimel-Belton* doctrines. The motive or intent based approach has been examined by this Court in two prior cases that were never resolved because this Court either dismissed the petition as improvidently granted or dismissed for want of jurisdiction. *Amicus* has a strong interest in preserving the rights granted under the Fourth Amendment and believes that a new zone-based approach is necessary. *Amicus* proposes a new rule that ignores subjective factors and focuses on objective factors; more precisely, the desire to create bright line rules that assist law enforcement officers in performing their duties and protects individual liberties. Given the increasing emphasis placed on law enforcement to ferret out national security threats, subjective inquiries must be abandoned in favor of objective inquiries. *Amicus* has demonstrated a disturbing and pernicious trend toward reducing privacy rights involving automobiles and believes that a more objective based inquiry is necessary. The new test is adequately described in the brief. Finally, as a matter of professional courtesy, a draft of this brief was sent to the Petitioner's counsel weeks before this filing and thus has had ample opportunity to review its substance and thus will not be prejudiced by this brief. Therefore, *amicus* requests the Court grant the leave.

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BRIEF OF SHASHANK S. UPADHYE AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

With the consent of the Respondent but without consent of the Petitioner, *amicus curiae,* Shashank S. Upadhye respectfully submits this brief in support of neither party.*

INTEREST OF *AMICUS CURIAE*

Shashank S. Upadhye is a lawyer who also studies the Fourth Amendment search and seizure law with a particular emphasis on the "automobile exception." Through this brief, Mr. Upadhye hopes to persuade this Court to adopt a rule that reflects and reaffirms the standards set forth in *Chimel* instead of adopting rigid rules that emasculate the protections of the Fourth Amendment. Moreover Mr. Upadhye writes to remind the Court that the undisputed rule of the Fourth Amendment is that warrants are required wherever reasonably possible and warrantless searches are the very limited exceptions. Furthermore, Mr. Upadhye writes to dissuade this Court from adopting rules proposed by law enforcement agencies that are couched in terms of "national security" in the post-September 11th aftermath. Because the ultimate relief sought by the parties threatens both the interests of society and poses harm to

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* Counsel of record for the United States consent, but Petitioner's counsel did not. In accordance with this Court's Rule 37.3(b), those letters have been filed with the Clerk.

In accordance with Rule 37.6, *amicus* states that this brief was authored in its entirety by the counsel listed on the cover, and no person or entity other than the *amicus* listed on the cover made a monetary contribution to the preparation or submission of this brief.

the respect for the Bill of Rights, Mr. Upadhye submits this brief.

SUMMARY OF THE ARGUMENT

The question presented is: whether the bright line rule announced in *New York v. Belton*, 435 U.S. 454 (1981) is confined to situations in which the police initiated contact with the occupant while that person is in the vehicle.

Regrettably, the answer is not that simple for via prior cases that went unresolved by this Court, the United States has disguised within this simple question a hidden but frontal attack on *Chimel v. California*, 395 U.S. 752 (1969), and *Belton*. More particularly, the rule professed by the United States further erodes the *Chimel-Belton* rules and furthers the erosion of applicable Fourth Amendment rights. *Belton's* indisputable holding is that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may as contemporaneous incident of that arrest, search the passenger compartment of that automobile. [footnote 3]" *Belton*, 454 U.S. at 460. In footnote 3, the Court took pains to also hold that the *Belton* holding "does no more than determine the meaning of *Chimel's* principles in this particular and problematic content. It in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests." Accordingly, because the *Belton* rule is predicated on the *Chimel* rule, then the bases of the *Chimel* rule dictate the contours of the *Belton* rule. The issue framed has enormous impact on the resolution of the case. Compare, *Bowers v. Hardwick*, 478 U.S. 186 (1986)(narrowly framed issue) with *Lawrence v. Texas*, 539 U.S. ___ (2003)(overruling *Bowers* on a more expansively framed issue). It is respectfully suggested that the issue as framed is wholly inadequate to the resolution of this case because it only concerns an intent or reason to exit. Rather, the issue for

resolution is: "may officers conduct a warrantless search of a vehicle under *Chimel-Belton* if the arrestee was within a spatial or temporal zone of the vehicle and does it matter whether the arrestee exited the car voluntarily?" See, *Owasso Indep. Sch. Dist. v. Falvo*, 534 U.S. 426, 431 (2002)(discussing merits of addressing questions not squarely presented in petition and certiorari grant).

None of the Supreme Court cases involving vehicle searches made intent or motive an issue in whether the search was permissible. Intent simply did not play a role in vehicle searches. But space and time have, and do, play a significant role in the vehicle cases. After all, the very essence of *Chimel* was a search incident to a lawful arrest in the areas where an arrestee could reach for weapons or destroy evidence. To this end, only regional appellate courts or state supreme courts have layered the intent or motive factor onto the *Chimel-Belton* tests.

As such, the best rule to adopt is one that placates the interests of the law enforcement agencies and the rights of individuals. To this end, this brief suggests that this Court adopt a new rule based on whether the arrestee was within a spatial or temporal zone of the vehicle as mandated by *Chimel-Belton* and ignore the reasons the arrestee exited the car. There are, therefore, four scenarios in the following matrix that defines the permissibility of the search. Column one identifies the reason for the arrestee's exit from the vehicle. Column two identifies whether the arrestee is within the Constitutional spatial or temporal zone and column three identifies whether a Constitutionally permissible search can result. Column four identifies a precedent, if available.

Scenario	Exit Reason	Proximity	Result	Precedent
1	Police Initiated	In-zone	Search	*Chimel* & *Belton*
2	Police Initiated	Outside Zone	No Search	*Belton* maybe & Fourth Amend-ment
3	Voluntary	In-zone	Search	New Rule & *Chimel*
4	Voluntary	Outside Zone	No Search	New Rule *Chimel*, & Fourth Amend-ment

ARGUMENT

I. *Belton* Does Not Extend Beyond The Scope Of *Chimel*, Which Is Strictly Construed.

Belton's holding does not at all suggest that the reason an arrestee exited a vehicle is important. *Belton* held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile. [footnote 3]" *Belton*, 454 U.S. at 460. In footnote 3, the Court took pains to also hold that the *Belton* holding "does no more than determine the meaning of *Chimel's* principles in this particular and problematic content. It in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to

lawful custodial arrests." *Chimel* provided for warrantless searches incident to a lawful arrest only under certain narrow circumstances. Accordingly, it is indisputable that *Belton* was a further narrowly drawn exception to *Chimel's* already narrow exception. *Chimel*, therefore, as the broader rule dictates the contours of *Belton*. Said another way, *Belton* cannot be broader than *Chimel*.

Now it is true that the Court has stated that "cars are not to be treated identically with houses or apartments for Fourth Amendment purposes." *Rakas v. Illinois*, 439 U.S. 128, 148 (1978). The purpose of that distinction rests in the inherent mobility of the vehicle creating the exigency of flight, *California v. Carney*, 471 U.S. 386, 392-93 (1985), *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996)("If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment ... permits police to search the vehicle without more."); or because there is a reduced expectation of privacy in vehicles given the pervasive governmental regulation of automobiles. *South Dakota v. Opperman*, 428 U.S. 364, 367-68 (1976) ("Automobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements...The expectation of privacy as to automobiles if further diminished by the obviously public nature of automobile travel."). But see, *Delaware v. Prouse*, 440 U.S. 648, 662 (1979)(a person operating a car "does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation").

Chimel was the first case to sanction the concept of a search incident to a lawful arrest. *Chimel* acknowledged that Court decisions on warrantless searches were far from consistent and acknowledged the difficulty in creating hard and fast rules. *Chimel*, 395 U.S. at 755. *Chimel* recognized, as a matter of First Principles, that the Framers adopted the Fourth Amendment as "a

reaction to the general warrants and warrantless searches that had so alienated the colonists and had helped speed the movement for Independence." *Chimel*, 395 U.S. 761. As a matter of Framer's Intent or early common law at the time of the Fourth Amendment, I found no case expressly discussing the application of the Amendment to horses, buggies, wagons, stage coaches, saddle bags, or other early modes of transportation as opposed to idly speculating what the common law was as the Court did in *Carroll v. United States*, 267 U.S. 132 (1925). See, *Wyoming v. Houghton*, 526 U.S. 295, 299 (1999)("The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." In determining whether a particular governmental action violates this provision, we inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed").[1]

Against this backdrop, the *Chimel* court pronounced the twin motives for warrantless searches as incident to a lawful arrest. The first motive was to protect the arresting officer from harm, e.g., to prohibit the arrestee[2] from reaching for a weapon. The second motive was to prevent the destruction or concealment of evidence. *Chimel*, 395 U.S. at 762-63. *Belton* did not add anything more except extend *Chimel* to vehicles. Again, neither *Chimel's* nor *Belton's* holdings suggested that the reason

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[1] See, e.g., 30 Geo. II. Ch. 22, Sec. 5, 13, 22 Stat. 107-108, 111 (1757)(authorizing arrest of people obstructing public streets, lanes or open passages with pipes, butts, barrels, casks, or an empty cart, car, dray, or other carriage); see also, 27 Geo. II, ch. 16, Sec. 7, 21 Stat. 188 (1754)(permitting arrest for negligent carriage drivers).

[2] The term "arrestee" denotes the vehicle occupant who exited the vehicle and was subsequently arrested and convicted based on the evidence obtained in the post-exit search.

the arrestee exited the vehicle was important. *Chimel* did not involve vehicles at all. But what C*himel* and hence *Belton*, did was endorse a zone-based approach.

I.A. *Chimel* Implicitly Adopted A Spatial And Temporal Relationship Theory Tying The Item Searched To The Arrestee.

As to the first motive, *Chimel* went to great pains to discuss "spatial and temporal" relationships incident to a warrantless search. With regard to the spatial relationship of the arrestee to the disputed evidence, the Court noted the gradual progression of the scope of the "space" that could be searched:

- the right was to search the arrestee only, not anything else (*Chimel*, 395 U.S. at 755);

- the permitted "space" morphed into the person or area "in his control" (*Chimel*, 395 U.S. at 755-56; citing to *Carroll v. United States*, 267 U.S. 132, 158 (1925));

- the space then became the area "in the possession or under the control of" the arrestee (*Chimel*, 395 U.S. at 760; citing to *United States v. Rabinowitz*, 339 U.S. 56 (1950));

- the space then became the area in "the offender's *immediate* custody" (*Chimel*, 395 U.S. at 757; citing *Go-Bart Importing v. United States*, 282 U.S. 344, 456 (1931)); and

- the space became "the" place – as opposed to just any place – "where the arrest is made in order to find and seize things connected with the crime as its fruits" (*Chimel*, 395 U.S. at 756; citing to *Agnello v. United States*, 269 U.S. 20, 30 (1925)).

But the underlying and indisputable theme in *Chimel* and the cases cited therein that is consistent with

the first motive was that the space to be searched was either the arrestee himself or the space in his "immediate" or "direct" or "in his control." There is no doubt that regarding the first motive, the *Chimel* rule was that "there is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control' – construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." *Chimel*, 395 U.S. at 763.

As such, the most consistent reading of this language is that "reachability" is the key determinant. "Reachability" as a test avoids fictitious, cartoonish, or incredible hypotheses that persons well outside the wingspan or at some distance from the vehicle, could be in theoretical reach of the weapon. According to Merriam Webster's dictionary, "immediate" means "directly touching or concerning a person or thing" or "acting or being without the intervention of another object, cause, or agency." *Belton* also sanctioned reachability as the determinant wherein the Court said that the space to search was the "passenger compartment [if] within reach of the arrestee" *Belton*, 453 U.S. at 460; and "drawers within an arrestee's reach could be searched." *Belton*, 453 U.S. at 461. It follows that reachability is the linchpin of the spatial relationship test for reachability means "an area within the immediate control" of the arrestee.

Confining *Belton* to its facts and narrow rule creates the appropriate rule that where the custodial arrestee is at some distance from his vehicle, or is in custody, then his vehicle is deemed to be at "another place" outside the vicinity of the arrest domain and hence a search is not incident to a lawful arrest. See, *Coolidge v. New Hampshire*, 403 U.S. 443, 457 (1971)("Mr. Justice Black's opinion for a unanimous Court held that 'once an accused is under arrest and in custody, then a search (of his car) made at another place, without a warrant, is simply not incident to the arrest."). See also, *Dyke v. Taylor*

Implement Mfg. Co., 391 U.S. 216, 220-21 (1968)(holding that the search of the vehicle outside the courthouse after the arrestees were well into custody inside the courthouse was too remote in time or place to be incident to a lawful arrest). Moreover, as held in *Chambers v. Maroney*, 399 U.S. 42, 47 (1970), that the "search that produced the incriminating evidence was made at the police station some time after the arrest and cannot be justified as a search incident to an arrest: 'Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest.'"[3]

As to the temporal relationship, this factor adjudges how long after the arrestee is in safe custody may the officer then go back and search the vehicle. It is true that once the arrestee is removed in time from his vehicle, the odds of him obtaining the weapon or destroying the evidence significantly decreases. One argument that is oft trumpeted by police is that a warrantless search is necessary at the time because "tracing the car and searching it hours or days later would of course permit instruments or fruits of crime to be removed from the car before the search." *Chambers v. Maroney*, 399 U.S. 42, 51 n. 9 (1970). But if *Chimel's* motives are to hold true, there is no significant likelihood that a *custodial arrestee*

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[3] Notwithstanding that *Chimel* was decided the previous year, the *Chambers* court held that the search was legal because: (a) the contents of the car perhaps would never be found again if the search was delayed while a warrant was sworn out, 399 U.S. at 51; (b) balancing the need for the warrantless search where probable cause existed with the need for a warrant, 399 U.S. at 52; (3) because it was dark outside, a careful search was impractical and perhaps not safe, 399 U.S. at 52 n. 10; and (4) the vehicle owner should be thankful that the police impound the vehicle at the stationhouse, 399 U.S. at 52 n. 10.

can remove instruments or fruits once under custodial arrest.

II. *Chimel* and *Belton* Mandate a Zone-Based Approach That Ignores The Arrestee's Motive For Exiting The Vehicle.

The key consideration, of course, must be on the spatial and temporal relationship of the arrestee to the vehicle at the time of the arrest, not at the time of the search because it is the arrest time where *Chimel* said that officer safety is tantamount. *Chimel*, 395 U.S. at 762-63. To this end, one can postulate a zone around the vehicle, both in time and place, against which the Constitutionality of a search is measured. There are, therefore, four scenarios in the following matrix that can define the Constitutionality permissibility of the search. The precise question on *certiorari* involves the reason for the arrestee's exit. Neither *Chimel* or *Belton* explicitly mentioned whether the warrantless search was permissible based on the reason the arrestee exited. Both cases are silent on the reason, motive, or intent to exit. The parties can point to no explicit language that sufficiently discusses reason, motive, or intent. The new rule proffered now Constitutionally ignores the intent or motive and consequently avoids subjectivity. In essence, arguing over intent creates much ado about nothing.

II.A. Why a Zone-Based Approach is Necessary.

The creation of the spatial and temporal zone is absolutely necessary to provide adequate guidance to law enforcement and to individuals. Without a zone-based approach, there are no limitations to the *Chimel-Belton* rule because there is "as much an arrest 24 hours later, or 48 hours later. There was just as much an arrest as if he had been 3 miles away, or 30 miles away, [and if measuring the operative condition as the time of the arrest, then the police] could search 2 days later and they could search 30 miles away." Transcript of Oral

Argument in *Florida v. Thomas*, Sup. Ct. Docket No. 00-391 (25 April 2001), pg. 6-7. As this statement shows, quite plainly the *Chimel* motives are not implicated at all.

This Court has not shied away from creating, defeating, or upholding spatial and temporal zones. For example, in the so-called abortion bubble zones, this Court sanctioned zones around abortion clinics into which protesters may not venture; see, *Schenck vs. Pro-Choice Network*, 519 U.S. 357 (1997) and *Hill v. Colorado*, 530 U.S. 703 (2000)(upholding zones around clinics); and in residential neighborhoods, *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986)(upholding zone around residential neighborhoods for adult-themed bookstores or videostores); but see ostensibly *United States v. Flores-Montano*, Sup. Ct. Docket No. 02-1794, cert. granted (per 19 U.S.C. §1581(a), providing no boundaries and unfettered discretion to Customs officials as the text of statute says, "at any time...at any place in the United States...and search the ... vehicle... and every part thereof...and use all necessary force to compel compliance."). This Court may strike down a statute that permits no boundary limitation and unfettered discretion to the officers. See *United States v. Ortiz*, 422 U.S. 891 (1975)(invalidating traffic checkpoint designed to locate illegal aliens because too far from border, statistical effectiveness unsubstantiated, and too great uncheckable police discretion).

Similarly, the Court approved of temporal zones, such as in the just-decided case of *United States v. Banks*, 540 U.S. ___ (2003)(Sup. Ct. Docket No. 02-473)(upholding 15-20 second period as being adequate time under the "knock and announce" rule). In another area of law, likelihood of confusion to prove trademark infringement includes confusion after the purchase decision. See generally, Shashank S. Upadhye, Trademark Surveys: Identification Of The Relevant Universe Of Consumers Who Must Be Confused, 8

Fordham I.P., Ent. & Media L.J. 550, 564-578 (June 1998)(analyzing spatial and temporal relationships in trademark infringement).

The United States may argue that an expansive temporal zone is permitted under *United States v. Johns*, 469 U.S. 478 (1985), wherein the Court permitted a warrantless search days after the custodial arrest and seizure. There the Court stated that there "is no requirement that the warrantless search of a vehicle occur contemporaneously with its lawful seizure." 469 U.S. at 484. In *Johns*, the Court noted, however, that "officers may indefinitely retain possession of a vehicle and its content before they complete a vehicle search." 469 U.S. at 487. But *Johns* stated the basis for searching the vehicle days later was because the probable cause that gave rise to arrest involved the vehicle itself. Moreover, *Johns* stated:

> [W]e do not suggest that police officers may indefinitely retain possession of a vehicle and its contents before they complete a vehicle search. *Cf. Coolidge v. New Hampshire*, 403 U.S. 443, 523 (1971) (White, J., dissenting). Nor do we foreclose the possibility that the owner of a vehicle or its contents might attempt to prove that delay in the completion of a vehicle search was unreasonable because it adversely affected a privacy or possessory interest. *Cf. United States v. Place*, 462 U.S. 696 (1983).

The plain language of *Johns* therefore limits the temporal zone to those instances in which the vehicle itself gave rise to the probable cause to search and seize. In addition, as discussed below, *Johns* can be reconciled on the basis of a temporary search seizure.

Belton also implicitly noted that searches that occur temporally after the arrest are not permitted as they

"cannot be viewed as incidental to the arrest or as justified by any other exigency." *Belton*, 453 U.S. at 462.

Fundamentally, the zone analysis provides a very workable rule. It avoids asking the embarrassing question to the arresting officer: "After you had handcuffed him and put him in your squad car, what was the particular threat to you or why did you believe that the arrestee could still destroy evidence?" An officer cannot credibly answer that he was in danger or that evidence was destroyed if the arrestee was secured and in custody. It also comports with *Knowles v. Iowa*, 525 U.S. 113, 114 (1998) where this Court also declined to adopt the bright line rule that traffic citations permitted a full-blown scope. In so holding, this Court noted that, "[I]n *Robinson* [*United States v. Robinson*, 414 U.S. 218 (1973)], we held that the authority to conduct a full field search as incident to an arrest was a "bright-line rule," which was based on the concern for officer safety and destruction or loss of evidence, but which did not depend in every case upon the existence of either concern. Here we are asked to extend that "bright-line rule" to a situation where the concern for officer safety is not present to the same extent and the concern for destruction or loss of evidence is not present at all. We decline to do so." Creating a zone-based approach and ignoring the reasons for exiting comports with the *Knowles* theory that there are circumstances in which plainly officer safety and evidence destruction are no longer implicated.

II.B. Explanation of Scenarios and Outcomes

There are, therefore, four possible scenarios based on the zone-based approach.

Column one identifies the reason for the arrestee's exit from the vehicle. Column two identifies whether the arrestee is within the Constitutional zone at the time of the arrest and column three identifies whether a Constitutionally permissible search can result. Column four identifies a precedent, if available.

Scenario	Exit Reason	Proximity	Result	Precedent
1	Police Initiated	In-zone	Search	*Chimel* & *Belton*
2	Police Initiated	Outside Zone	No Search	*Belton* maybe
3	Voluntary	In-zone	Search	New Rule & *Chimel*
4	Voluntary	Outside Zone	No Search	New Rule

Scenario One is self-explanatory as this is the current rule under *Chimel* and clearly the case under *Belton*. Because the arrestee was within the zone of the vehicle at the time of the search. Both *Chimel* motives are implicated because the arrestee can reach for a weapon and can destroy evidence.

Scenario Two does not permit a search in this case because the *Chimel* motives are not implicated, at the time of the arrest, and it is not clear whether *Belton* holds that the search may take place. Whether *Belton* applies

is precisely the issue in this case and was in *Florida v. Thomas*, 532 U.S. 774, 776 (2001)(dismissing certiorari for want of jurisdiction), and in *Arizona v. Gant*, 202 Ariz. 240 (2002), cert. granted, 2003 WL 1903726 (2003)(certiorari dismissed). This is because when the arrestee is outside the zone, none of the *Chimel* factors can apply, and objectively, the arrestee cannot reach for a weapon nor destroy evidence, and an attempt to do so, would be manifestly unreasonable. See, *Florida v. Jimeno*, 500 U.S. 248, 250 (1991)("the touchstone of the Fourth Amendment is reasonableness"); *Florida v. Royer*, 460 U.S. 491, 506 (1983)(eschewing bright line tests and emphasizing reasonableness inquiry); *Michigan v. Chesternut*, 486 U.S. 567, 572-73 (1988)(rejecting both parties desire for bright line rule in favor of the traditional contextual approach). Accordingly, this search is not allowed because the objectively contextual factors elucidating whether the arrestee was within the zone do not permit a search.

Scenario Three is a narrow rule that satisfies a law enforcement agency's desire to remove voluntariness/police initiation from the *Chimel-Belton* inquiry, but reinforces that the *Chimel* motives must be examined. Under this scenario, a law enforcement agency gets what it wants – that is, the ability to search a quick witted arrestee who "outfoxes" the flat-footed officer by voluntarily exiting the vehicle. Ignoring intent avoids subjective determinations, such as:

(1) whether the arrestee was aware of the police when he got out of the car, a determination that may depend on whether the police are in uniform or a marked squad car, police lights or sirens have been activated, or the arrestee was impaired in a manner that could have affected his awareness of the police; (2) whether, the arrestee appeared to get out of the car voluntarily, the arrestee nevertheless did so to avoid the [*Belton* rule]; and (3) whether an officer sufficiently signaled confrontation with an arrestee while he was in the car,

such that the arrestee got out of the car due to the officer's contact as opposed to another reason. *Amicus* Brief of the United States in *Arizona v. Gant* (Sup. Ct. Docket No. 02-1019), pg. 17.

As such under Scenario Three, officers may search the car, irrespective of the reason of the arrestee's exit because at the time of the arrest, the arrestee was within the *Chimel-Belton* zone.

Scenario Four, like the second, ignores the voluntariness/police initiation subjective inquiry and returns the inquiry's focal point to *Chimel's* twin motives. Here, because the arrestee is outside the zone of the vehicle at the time of the arrest, no warrantless search is permitted.

II.C. Justification For A Zone-Based Approach

These scenarios permit the authorities to:

(a) ignore subjective inquiries into the arrestee's intent in exiting the vehicle (the very issue in *Thomas* and *Gant*);

(b) search a vehicle under the *Chimel-Belton* legal fiction to satisfy practical and doctrinal concerns only insofar that *Chimel*'s undisputed basic twin motives are objectively examined;

(c) search without a warrant in situations that are "strictly tied to and justified by the circumstances which rendered its initiation permissible," *Chimel*, 395 U.S. at 762, *Belton*, 453 U.S. at 457;

(d) obtain the necessary warrant issued by the neutral magistrate in those situations where the Constitution requires it for Fourth Amendment compliance (but see, *Florida v. White*, 526 U.S. 559 (1999)("Fourth Amendment does not require the police to

obtain a warrant before seizing an automobile from a public place when they have probable cause to believe that it is forfeitable contraband", and as when the arrestee is outside the zone;

(e) comply, as necessary, with the Constitutionally acceptable requirements of inventory searches, see *Colorado v. Bertine*, 479 U.S. 367 (1987), *South Dakota v. Opperman*, 428 U.S. 364 (1976), or comply with "temporary seizures" while the officers swear out a warrant to search the car, see *Illinois v. McArthur*, 531 U.S. 326 (2001)(permitting officer's to deny entry into arrestee's own home temporarily seizing home whilst other officer's obtain search warrant); *United States v. Place*, 462 U.S. 696, 706 (1983)("we conclude that when an officer's observations lead him reasonably to believe that a traveler is carrying luggage that contains narcotics, the principles of *Terry* [*v. Ohio*, 392 U.S. 1 (1968)] and its progeny would permit the officer to detain the luggage briefly to investigate the circumstances that aroused his suspicion, provided that the investigative detention is properly limited in scope;" (emphasis added); *United States v. Brignoni Ponce*, 422 U.S. 873 (1975)(permitting officer to briefly detain vehicle on suspicion of carrying illegal aliens); *United States v. Flores-Montano*, U.S. Supreme Court Docket No. 02-1794, cert. granted, 14 Oct. 2003 (whether Customs may remove, disassemble vehicle's gas tank during border search); and *United States v. Van Leeuwen*, 397 U.S. 249, 253 (1970) (holding 29-hour detention of mailed package reasonable given unavoidable delay in obtaining warrant and minimal nature of intrusion);

(f) obtain consent of the arrestee to search the car, *Florida v. Bostick*, 501 U.S. 429 (1991), *Florida v. Jimeno*, 500 U.S. 248 (1991); and

(g) provide a bright-line rule consistent with *Belton* to provide a "single familiar standard," *Belton*, 453 U.S. at 458-59, and ensure that "responsible Fourth

Amendment balance is not well-served by standards requiring sensitive, case-by-case determinations and government need, less every discretionary judgment in the field be converted into an occasion for constitutional review." *Atwater v. City of Lago Visa*, 532 U.S. 318, 347 (2001).

The United States would have this Court rule on the very precise issue of whether voluntariness permits a vehicle search without analyzing whether the *Chimel* twin motives are present. That is, the rule proffered assumes that the *Chimel* motives are satisfied—without any examination if that truly is the case. As such, if adopted, the rule would in effect become: "Officers may search a vehicle, regardless of the reason the arrestee exited the vehicle, at any time thereafter, irrespective of the distance of the arrestee to the vehicle, and irrespective of whether the arrestee could have reasonably obtained a weapon or destroyed evidence." Thus, this further exception to *Chimel-Belton* would in effect swallow the general rule of *Chimel* and its twin motives, thereby emasculating whatever privacy rights anyone had in his person or effects as related to an automobile. See, *Florida v. J.L.*, 529 U.S. 266, 273 (2000)("rejecting a *per se* exception to the "knock and announce" rule for narcotics cases partly because "the reasons for creating an exception in one category [of Fourth Amendment cases] can, relatively easily, be applied to others," thus allowing the exception to swallow the rule").

To be sure, under the current law surrounding vehicles, there has been a slow but concerted erosion of any privacy rights in automobiles. See, *Wyoming v. Houghton*, 526 U.S. 295 (1999)(passenger has no privacy rights in his effects); *Chambers v. Maroney*, 399 U.S. 42 (1970)(the search was valid, despite the fact that once the car was at the station-house the police could easily have gotten a search warrant); *Texas v. White*, 423 U.S. 67 (1975) (same); *Florida v. White*, 526 U.S. 559

(1999)(police have a right to impound the car after arrest and search it without a warrant even where they had advance notice and could easily have gotten a search warrant before the entire episode); *United States v. Ross*, 456 U.S. 798 (1982) and *California v. Carney*, 471 U.S. 386 (1985)(where the police have probable cause to believe that a car is being used to transport contraband, and they stop it, they may conduct a warrantless search not only of the car but of closed containers in the car. They may do this on the scene, without even impounding the car (as they have to do in the above "search at the station-house after arrest" scenario); *California v. Acevedo*, 500 U.S. 565 (1991)(even if the police's probable cause relates solely to a closed container inside the car, not to the car itself, the police may stop the car and seize and open the container, all without a warrant); *Pennsylvania v. Mimms*, 434 U.S. 106 (1977)(on a stop based on reasonable suspicion, an officer may require the driver to exit the vehicle without specifically showing that requiring such an action was necessary for the officer's protection); *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) (warrantless stop and search of auto by roving patrol near border). See, generally, *Acevedo*, 500 U.S. at 582-84 (Scalia, J)(outlining the 20+ exceptions to warrantless searches).

"Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes," *United States v. Jeffers*, 342 U.S. 48, 51, and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment - subject only to a few specifically established and well-delineated exceptions. *Katz v. United States*, 389 U.S. 347, 357 (1967). To this end, the new zone based-approach comports with the general rules of warrants and provides a workable rule for law enforcement.

Because *Chimel* expressly limited warrantless searches to being incident to a lawful arrest, and that

Belton only narrowly extended *Chimel* to the passenger area of a vehicle to effectuate the *Chimel* policies, whether the occupant exited voluntarily or by police instigation is irrelevant. Presumptively a search is only permitted under *Belton* if the *Chimel* policies are satisfied. Because the *Chimel* factors only implicate the spatial and temporal relationship of the arrestee to his vehicle, a very workable rule can be defined.

Somewhere along the way, the *Carroll* case and its statutory search for contraband in vehicles and *dicta* from that case have contorted the Fourth Amendment's applicability to vehicles. This pernicious effect has had profound implications on vehicle operators or passengers to the extent that almost nobody has any reasonable privacy rights in a vehicle. In *Boyd v. United States*, 116 U.S. 616, 635 (1886), the Court noted (in an era before widespread vehicle use):

> though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

III. Application Of The Zone Based Approach To Thornton

In this case, the facts found by the trial court, affirmed on appeal, and not challenged here all indicate that Mr. Thornton: (a) exited the car on his own; (b) was arrested while Mr. Thornton was standing beside his car; (c) was placed into custody in the squad car; and (d) admitted he was in "close proximity" to his car. *Thornton*, 325 F.3d 189, 196 (4th Cir. 2003). It is unclear from the record whether the "close proximity" of Thornton satisfies *Chimel's* spatial test. It is unclear whether this finding is a finding of fact or conclusion of law warranting deferential or *de novo* review respectively by this Court. Furthermore, if the zone-based approach is adopted, then this Court may affirm the conviction if "close proximity" brings Mr. Thornton within the zone. Alternatively, the Court ought to remand the case to the district court for further examination consistent with the zone-based approach to determine if he was in the zone. It may occur on further examination that under the zone-based approach, his facts satisfy Scenario 3 in that he voluntarily exited the car and was in the zone at the time of his arrest. As such, his conviction ought to be affirmed as the search was Constitutionally permissible under *Chimel*, as modified by *Belton*. On the other hand, the facts may indicate that he was outside the zone and thus suppression was Constitutionally required.

CONCLUSION

For these reasons, this Court ought to adopt a zone based approach that gives fidelity to *Chimel-Belton* and limits the number of exceptions created under the Fourth Amendment.

Respectfully submitted,

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IN THE

Supreme Court of the United States

MARCUS THORNTON,

Petitioner,

—v.—

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 400,000 members dedicated to the principles of liberty and equality embodied in the Bill of Rights. The ACLU of Virginia is one of its statewide affiliates. This case involves the proper interpretation of *New York v. Belton*, 453 U.S. 454 (1981), which held that a valid arrest of an automobile occupant permits a contemporaneous search of the passenger compartment incident to arrest. Earlier this term, the ACLU filed an *amicus* brief in *Arizona v. Gant*, 72 U.S.L.W. 3280 (Oct. 20, 2003) (vacated and remanded in light of an intervening state court decision), which addressed whether *Belton*'s holding extended to a "recent occupant" of a vehicle. That brief proposed that the *per se* rule of *Belton* should be confined to cases where police *seize* a person inside the vehicle.

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit corporation founded in 1958 to ensure justice and due process for persons accused of crime; to foster integrity, independence, and expertise of the criminal defense bar; and to promote the proper and fair administration of criminal justice. NACDL filed *amicus* briefs in *Gant* (with its co-*amici* the ACLU), and *Florida v. Thomas*, 532 U.S. 774 (2001), which raised but did not ultimately resolve the *Belton* question that this case again presents.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members or its counsel made a monetary contribution to the preparation or submission of this brief.

STATEMENT OF THE CASE

On July 21, 2003, Officer Deion Nichols of the Norfolk, Virginia police department was in uniform and driving an unmarked cruiser on Sewells Point Road when he observed a gold vehicle driving behind him. The officer's suspicions were aroused when the vehicle "wouldn't come all the way up to" his cruiser. JA 9. Nichols turned onto a side street so that the gold vehicle would pass him. When he returned to Sewells Point Road, Nichols saw a gold Lincoln Town Car and checked the license plate of that vehicle. Petitioner, Marcus Thornton, was the driver and sole occupant of the Lincoln. The check indicated that the license plate belonged to a 1982 Chevy two-door car rather than a Lincoln. Nichols intended to stop the Lincoln, but was unable to do so because the vehicle "pulled into [a] parking lot before [he] had a chance to do so." JA16.

According to Nichols, petitioner had "pulled into a parking lot, [and] exited his vehicle," JA 16, when the officer "pulled in behind him [and] exited" his cruiser. *Id.* The officer approached petitioner and asked to see his driver's license. After Nichols informed petitioner that the tags on his vehicle did not match the Lincoln, petitioner "appeared nervous, right way started rambling" and began "sweating." JA 10. For his own safety, Nichols asked petitioner if he had any weapons or narcotics on his person or in his vehicle, which petitioner denied. Nichols then requested and received petitioner's consent to perform a patdown frisk for weapons. When the officer felt a "bulge in [petitioner's] left front pocket," he asked petitioner if he had any illegal narcotics on his person. Petitioner replied that he had "a bag of weed," and gave the officer two bags of illegal narcotics. Petitioner was arrested, handcuffed and placed in Nichols' cruiser. JA 42. Nichols then searched the Lincoln and discovered a handgun under the driver's seat.

Petitioner was charged with narcotics and weapon offenses. Relying on *New York v. Belton*, 453 U.S. 454 (1981), the district court denied petitioner's motion to suppress the gun found inside the Lincoln. JA 30-37. After petitioner was convicted of narcotics and weapons offenses, he appealed the district court's refusal to suppress the gun found inside his car. The Court of Appeals affirmed. JA 61-75. Specifically, the appellate court rejected the argument that *Belton*'s *per se* rule applies only where "'the officer initiates contact with the defendant, either by actually confronting the defendant or by signaling confrontation …while the defendant is still in the automobile.'" *Id.* at 68 (citation omitted). The court's conclusion was based on three primary concerns. First, in the Fourth Circuit's view, dicta from *Michigan v. Long*, 463 U.S. 1032 (1983) suggested "that an officer may search an automobile incident to arrest, even if the officer has not initiated contact while the arrestee was still in the automobile." JA 71. Second, the traditional justifications for the search incident to arrest rule, officer safety and preserving evidence, "continue to be concerns regardless of whether the arrestee exits the automobile voluntarily or because of confrontation with an officer." *Id.* at 72 (citations omitted). Finally, the court believed that petitioner's argument would endanger officer safety. The court imagined that a "contacts" test would force an undercover officer to reveal his identity if the "officer encounters the arrestee while conducting undercover surveillance in an area," and that "it [might] often be safer for [police] to wait until the suspect has exited a vehicle before signaling their presence, thereby depriving the suspect of any weapon he may have in his vehicle, the protective cover of the vehicle, and the possibility of using the vehicle itself as either a weapon or a means of flight." *Id.* Ultimately, the court ruled that the search was lawful because petitioner was in "close proximity" to his vehicle, both temporally and spatially, when Officer Nichols approached him. *Id.* at 74.

This Court granted *certiorari* on the following question: Is *Belton*'s bright-line rule confined to situations in which police initiate contact with the occupant of a vehicle while the person is in the vehicle?

SUMMARY OF ARGUMENT

In *Chimel v. California*, 395 U.S. 752 (1969), and *New York v. Belton*, this Court explained that although searches incident to arrest were an exception to the warrant requirement, an officer's authority to conduct a search incident to arrest "'must be "strictly tied to and justified by" the circumstances which rendered its initiation permissible.'" *Chimel,* 395 U.S. at 762, quoting *Terry v. Ohio,* 392 U.S. 1, 19 (1968); *Belton,* 453 U.S. at 457, quoting *Terry*. The two traditional rationales for the search incident to arrest exception are officer safety and preserving evidence. *Knowles v. Iowa*, 525 U.S. 113, 116 (1998). *Chimel* announced that search incident to arrest permits a search of the arrestee's person, as well as "the area 'within his immediate control,'" for weapons or evidence. *Chimel,* 395 U.S. at 763. In *Belton*, noting that it was simply applying *Chimel*'s "immediate control" test to the "particular and problematic" context of arresting a car occupant, this Court held that a valid arrest of an automobile occupant permits a contemporaneous search of the passenger compartment incident to the arrest. *Belton,* 453 U.S. at 460, n.3.

The federal and state courts have divided over the applicability of *Belton*'s *per se* rule when police arrest a person who is a "recent occupant" of a vehicle. Attempting to resolve this issue, the lower courts have split over the workability and virtues of an "initiates contact" test. We propose a *per se* rule that complies with *Chimel*'s and *Belton*'s command that search incident to arrest authority be strictly tied to the need for officer safety and preserving evidence. Specifically, we submit that *Belton*'s holding should be confined to cases where police seize a person

inside a vehicle,[2] the suspect is arrested, and the vehicle is searched contemporaneous with the arrest. If a person was not seized while inside a vehicle, the scope of an officer's authority to search is governed by *Chimel*, not by *Belton*. Restricting *Belton* to cases where a person was seized while inside a car avoids case-by-case judgments regarding an arrestee's temporal or spatial proximity to the vehicle. Officers and judges need only decide whether a person was seized while an occupant of a car. When police seize a person inside a car and the person is subsequently arrested, the *per se* rule of *Belton* applies.

This Court should reverse the judgment below because it conflicts with *Chimel*'s and *Belton*'s mandate that search incident to arrest power be "strictly tied to and justified by" the circumstances calling for the search and because it is not a bright-line rule. The ruling below insisted that a "close proximity" or "positively linked" standard, *see* JA 74, "does not render [the *Belton*] rule limitless." *Id.* (footnote omitted). But a finding of "close proximity" or "positive linkage" "does not establish that the arrestee had an opportunity to access weapons or to conceal or destroy contraband, the foundation of the holdings in both *Belton* and *Chimel*." *Minnesota v. Robb*, 605 N.W. 2d 96, 101 (Minn. 2000). For example, one court has found that a person was in

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[2] Police have authority to seize a car and the motorist therein when they have reasonable suspicion or probable cause that the motorist has committed a crime or traffic offense. *See Delaware v. Prouse,* 440 U.S. 646, 653 (1979) ("stopping an automobile and detaining its occupants constitute a 'seizure' within the meaning of the Fourth Amendment"). *Cf. Colorado v. Bannister*, 449 U.S. 1, 4, n. 3 (1980) (*per curiam*) ("There can be no question that the stopping of a vehicle and the detention of its occupants constitute a 'seizure' within the meaning of the Fourth Amendment."). A *pedestrian* is "seized" under the Fourth Amendment only if a reasonable person would have believed that he was not free to leave the scene, or would not have felt "free to decline [an officer's] requests or otherwise terminate the encounter." *Florida v. Bostick*, 501 U.S. 429, 434, 436-37 (1991).

"close proximity" to his vehicle where police observed the person lawfully park his vehicle, exit the vehicle and walk toward a house on the other side of the street. *See Glasco v. Virginia*, 513 S.E. 2d 137, 142 (Va. 1999) (upholding search because the driver was "in close proximity to the vehicle" and thus "a recent occupant of the vehicle within the limits of the *Belton* rule"). Although the standard adopted below allows this search, the traditional rationales that justify the search incident to arrest exception – officer safety and preservation of evidence – do not.

More importantly, the judgment below will not promote clarity. If *Belton*'s *per se* rule is triggered whenever an arrestee is in "close proximity, both temporally and spatially," to his vehicle, JA 74, officers and judges will still be required to weigh temporal and spatial factors to determine when a vehicle search is permissible. If a "single familiar standard is essential to guide police officers" in this context, *see Belton*, 453 U.S. at 458, then this Court should reject any proposal that requires officers and judges to undertake case-by-case assessments of whether a car search is authorized incident to an arrest. Unlike the ruling below, our proposal avoids the particularized inquiry necessary under a "close proximity" standard.

Belton defined what constitutes "immediate control" under *Chimel* for the frequently occurring situation where police seize and arrest automobile occupants. Rather than forcing officers to make individualized assessments of a car occupant's "grabbing distance," *Belton* adopted a legal fiction to paper over the analytical absurdities that emerged when judges read *Chimel*'s "immediate control" test to permit vehicle searches in cases where there was no way an arrestee – handcuffed and sitting in a police cruiser – would have access to the contents of his vehicle. While there is significant tension between *Chimel* and *Belton*, a careful reading of *Belton* clarifies that *Belton*'s *per se* search rule

does not apply to every case involving a "recent occupant" of an automobile. *Belton* never defined or addressed who is a "recent occupant" for search incident to arrest purposes. Rather, the holding in *Belton* confirms that its bright-line rule only applies to arrestees who were "occupants" of an automobile when their vehicle was seized by the police. While it is true that an arrestee need not be inside his car when the police conduct the search, and that *Belton* itself used both the terms "occupant" and "recent occupant," *Belton*'s analytical focus was directed at an arrestee who was an occupant of a vehicle when the police seized it. The single use of the phrase "recent occupant" in *Belton* was a clear reference to the fact that Roger Belton had been seized while an occupant of an automobile, exited the vehicle, and was arrested shortly after leaving the vehicle.

ARGUMENT

I. THE BACKGROUND AND DEVELOPMENT OF *BELTON*'S *PER SE* RULE

Chimel sought to clarify the authority of the police to search incident to arrest.[3] For half a century prior to *Chimel*,

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[3] In resolving Fourth Amendment questions, this Court often considers common law rules to evaluate the reasonableness of a challenged police intrusion. *See, e.g., Wyoming v. Houghton,* 526 U.S. 295, 299-300 (1999). Generally speaking, the common law permitted searches incident to arrest. However, the legality of a search incident to arrest "has historically been formulated into two distinct propositions." *United States v. Robinson,* 414 U.S. 218, 224 (1973). The common law recognized an officer's power to seize weapons or stolen property from an arrestee's *person*. *See* Thomas Y. Davies, *Recovering the Original Fourth Amendment,* 98 MICH. L. REV. 547, 627 (1999). Searching the *area* within the arrestee's control, "while likewise conceded in principle, has been subject to differing interpretations as to the extent of the area which may be searched." *Robinson*, 414 U.S. at 224. To the extent that the common law "yields [an] answer," *Houghton,* 526 U.S. at 299, on the scope of an officer's authority to search the "area" within an arrestee's control, those sources do not support a broad interpretation of an officer's authority to search incident to arrest.

the scope of an officer's authority to search incident to arrest was "subject to shifting constitutional standards" and inconsistent statements from the Court. *Chimel*, 395 U.S. at 770 (White, J., dissenting). Prior to the *Chimel* ruling, the Court upheld extensive searches of private premises under the search incident to arrest rule. *See, e.g., United States v. Rabinowitz*, 339 U.S. 56 (1950), *Harris v. United States*, 331 U.S. 145 (1947). Under these precedents, a lawful arrest authorized a search of the entire area "considered to be in the 'possession' or under the 'control' of the person arrested." *Chimel*, 395 U.S. at 760. *Chimel* rejected that standard because it gave police too much power to conduct discretionary searches that were not justified by the historical rationales supporting the search incident to arrest exception. *Chimel* explained that although the Fourth Amendment's Warrant Clause requirements did not control search incident to arrest power, an officer's authority in this context would be judged by the same constitutional norms that governed other warrantless intrusions. Thus, the scope of an officer's

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At the time of the framing, legal authorities did not recognize an officer's power to search an arrestee's home incident to arrest. *See* William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning*, 602-1791, at 1183-84 (1990) (unpublished Ph.D. dissertation, Claremont Graduate School) (footnote omitted) ("The legal authors of 1761-1776 agreed that houses could be broken into to consummate the arrest process, but they did not also say that houses could be searched during that process. The assumption of most legal authorities, in other words, was that arrests and arrest warrants were not excuses to conduct general searches."). Professor Telford Taylor has asserted that "[t]here is little reason to doubt that search of an arrestee's person and *premises* is as old as the institution of arrest itself," Telford Taylor, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 28 (1969) (emphasis added), but the historical support for Taylor's conclusion on the scope of an officer's power to search an arrestee's home incident to arrest is extremely weak. *See* Davies, *supra*, at 646, n.276. Professor Davies has noted that "[t]he reported decisions regarding the allowable scope of search incident to arrest first became evident in court records during the late nineteenth century." *Id.* at 638, n.250. Thus, the common law, *at the time of the framing*, did not recognize broad powers of search incident to arrest.

authority to search incident to arrest "'must be "strictly tied to and justified by" the circumstances which rendered its initiation permissible.'" *Id.* at 762 (citation omitted). Put simply, an officer's search authority must be limited to the traditional interests that justify the search incident to arrest exception.

Chimel reaffirmed the two historical purposes served by a search incident to arrest: to secure any weapon that the arrestee might use to resist arrest or escape and to preserve the integrity of any evidence the arrestee might conceal or destroy. *Id.* at 763. Mindful that a warrantless intrusion must be strictly tied to the purposes of the search, *Chimel* announced that search incident to arrest authority permits the police to search for weapons or evidence on the arrestee's person, as well as "the area 'within his immediate control'– construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." *Id.*

Chimel's holding was narrow. Given that the search of Chimel's home extended beyond his person and "grabbing distance," the evidence discovered by the police was suppressed. *Id.* at 768 ("The search here went far beyond the petitioner's person and the area from within which he might have obtained either a weapon or something that could have been used as evidence against him."). Thus, there was no need for the *Chimel* Court to address the question of "where the police *are allowed* to search" under the "grabbing distance" prong. Myron Moskovitz, *A Rule in Search of a Reason: An Empirical Reexamination of* Chimel *and* Belton, 2002 WIS. L. REV. 657, 659-60.

After the *Chimel* decision, some lower courts were "hesitant to apply the *Chimel* rationale to the search of vehicles incident to arrest." 2 Wayne R. LaFave, SEARCH AND SEIZURE, § 7.1 at 499 (1978). When occupants of automobiles were placed under arrest, some lower courts

applied *Chimel*'s "immediate control" rule in a manner that conflicted with the purposes and rationale of *Chimel*. As Professor LaFave explained in the first edition of his treatise on the Fourth Amendment:

> [C]ourts sometimes interpreted the *Chimel* ["immediate control" or "grabbing distance"] concept as if it were synonymous with possession; if the defendant had been driving the car immediately before his arrest, then the car was considered to be in his control and thus subject to a warrantless search. This approach quite clearly cannot be squared with *Chimel*, where the Court explicitly rejected the notion that it was reasonable to search a place merely because it was in the possession of the arrestee. Equally inconsistent with *Chimel* is the proposition, accepted by a few courts, that the part of the car's interior which the defendant could have reached at the time the vehicle was stopped by the police somehow remains a fixed area of "immediate control" even after the defendant has alighted from the automobile. Under *Chimel*, the question is not whether the defendant could have reached a certain area on a prior occasion; rather, it is whether the defendant can *presently* (i.e., at the moment of search) reach that area.

Id. at § 7.1 at 500-01 (footnotes and citation omitted).

Belton built directly on *Chimel*'s holding. *Belton* addressed the following narrow issue: "When the *occupant* of an automobile is subjected to a lawful custodial arrest, does the constitutionally permissible scope of a search incident to his arrest include the passenger compartment of the automobile *in which he was riding*?" 453 U.S. at 455 (emphases added). In answering this question, the Court reaffirmed what *Chimel* had emphasized: a search incident to

arrest "'must be strictly tied to and justified by the circumstances which rendered its initiation permissible." *Id.* at 457 (citation and internal quotation marks omitted). The Court also sought a "'single familiar standard'" to guide police officers in determining "the proper scope of a search of the interior of an automobile incident to a lawful custodial arrest of its occupants." *Id.* at 458-59. *Belton* held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Id.* at 460 (footnotes omitted). The Court explained that its ruling "does no more than determine the meaning of *Chimel*'s principles in this particular and problematic context. It in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of search incident to lawful custodial arrests." *Id.* at 460, n.3.

While the *Belton* Court merely sought to resolve how *Chimel*'s "immediate control" test should be applied to occupants of automobiles, the means employed by the Court undermined *Chimel*'s intent to strictly confine search incident to arrest authority to "'the exigencies of the situation [that] made that course imperative.'" *Chimel*, 395 U.S. at 761, quoting *McDonald v. United States*, 335 U.S. 451, 456 (1948). A *per se* rule that authorized a search of a vehicle's passenger compartment was not compatible with the "immediate control" or "grabbing distance" test. When *Belton* was decided, it was standard police practice to have an arrestee secured and removed from a vehicle *prior* to the search. Thus, when an officer searches a car, the passenger compartment of the vehicle is not within the arrestee's "immediate control" or grabbing distance. In fact, most of the pre-*Belton* lower court rulings that applied *Chimel* to vehicles involved "situations in which the arrestee was outside of the vehicle at the time of the search." 2 LAFAVE, *supra* at § 7.1 at 501. Although judges upheld vehicle searches incident to

an arrest, many of these rulings were based upon "an assumption that the arrestee was 'possessed of the skill of Houdini and the strength of Hercules' and thus could readily enter the car notwithstanding his distance from it and the manner of his custody." *Id.*

Belton resolved the incompatibility between the "immediate control" test and a *per se* rule by adopting a legal fiction: "articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m].'" *Belton*, 453 U.S. at 460, quoting *Chimel*, 395 U.S. at 763. Although *Belton* denied that its holding was a retreat from *Chimel*, in a case like petitioner's, application of *Belton*'s legal fiction exposes a conflict between *Belton*'s determination to provide officers with a "workable rule," *id.* at 460 and *Chimel*'s goal to strictly confine an officer's search incident to arrest authority.[4]

A. The Factors Compelling *Belton*'s Bright-Line Rule

When police arrest a person inside a home, or a pedestrian on the street, *Chimel* permits a search of the arrestee's person, as well as a search of the area within the

[4] The first substantive question asked during the oral argument in *Florida v. Thomas*, highlights the tension between *Belton*'s legal fiction and *Chimel*'s intent to strictly confine searches incident to arrest to those contexts where a weapon or evidence might be accessible to an arrestee: "QUESTION: And do you say that *Belton* allows the person outside the car to be taken away, secured, removed, and then the officers can go back and search the car?" Tr. Oral Arg. *Florida v. Thomas*, No. 00-391 at 4-5; *see also id.* at 6 (Justice Souter asking: "Well, [the search] may have been part of one ongoing transaction, but it - - that does not, I think, affect the fact that the moment of the search seems to have been totally untethered from the justifications for the *Belton* rule because, as I understand it, at the time the search was made, the defendant was in the house. The defendant couldn't reach into the car for weapons or for evidence.").

arrestee's "immediate control." When such an arrest occurs, deciding what constitutes an arrestee's "immediate control" depends on the particular facts of each case. *See* 3 Wayne R. LaFave, SEARCH AND SEIZURE, § 6.3 (c) at 305-12 (3d ed. 1996). In *Belton*, this Court recognized that determining the proper scope of a car search incident to arrest involves a "problematic" application of *Chimel's* "immediate control" rule. *Belton*, 453 U.S. at 460, n. 3. Applying *Chimel's* "immediate control" test in this context is problematic for both practical and doctrinal reasons.

As a practical matter, an officer cannot remove a motorist from a car, effectuate an arrest, secure the arrestee and search his "grabbing distance" in a single stroke. This dilemma is particularly vexing when a single officer encounters a multi-occupant vehicle, as was the case in *Belton*. When conducting the arrest of a motorist or passenger inside a car, an officer first secures an arrestee to protect his or her own safety. Then an officer exercises his authority to search the area within the arrestee's immediate control. In all but the most extraordinary case, when the officer begins a search, the arrestee is no longer inside the vehicle, *see United States v. Karlin*, 852 F.2d 968, 971 (7th Cir.1988), *cert. denied*, 489 U.S. 1021 (1989), just as a pedestrian will be secured before an officer searches a container or object within the grabbing distance of the pedestrian. *See, e.g., Draper v. United States*, 358 U.S. 307, 314 (1959) (search of a "zipper bag" that arrestee was carrying was valid search incident to arrest).

Chimel's "immediate control" rule thus created doctrinal problems when applied to occupants of automobiles. "Sometimes it was assumed that the *Chimel* holding did not carry over to the vehicle cases." 2 LAFAVE, at § 7.1 at 499. Even when courts applied *Chimel*'s holding to cars, the "immediate control" rule offered hazy answers for officers and the judiciary. The "immediate control" test produced inconsistent results when applied on a case-by-case

basis to the arrest of a car occupant, *see Belton*, 453 U.S. at 460-61, and lower court rulings often applied *Chimel*'s "immediate control" rule in a manner that conflicted with the intent of that decision. 2 LAFAVE, at § 7.1 at 500-01. Indeed, *Belton* acknowledged that "no straightforward rule ha[d] emerged from the litigated cases" regarding the extent of police authority to search a car incident to the arrest of an occupant. 453 U.S. at 459.

Accordingly, *Belton*'s legal fiction was designed to make it easier for police and judges to apply *Chimel*'s "immediate control" test to a person seized while occupying a car.

> [*Belton*] adopted a factual presumption that, if the arrestee is an occupant of the vehicle, the arrestee can reach in the vehicle and get a weapon or destroy evidence. Following *Belton*, a showing of the actual fact of occupancy would automatically provide the presumed fact of access to the passenger compartment which is required by *Chimel* as a prerequisite for a warrantless search of a vehicle incident to arrest.

Glasco v. Virginia, 513 S.E.2d 137, 144 (Va. 1999) (Lacy, J., concurring). Instead of police officers conducting individualized on-the-spot assessments of an automobile occupant's "grabbing distance," *Belton* established a bright line to resolve the ambiguities that arose when applying the "immediate control" test to an arrestee seized while inside a vehicle. For someone seized while an occupant of a car, *Chimel*'s "immediate control" test would be triggered at the moment the police seizure occurred, and would extend to the entire passenger compartment of the vehicle.

B. The Factors That Compelled *Belton's* Holding Are Absent When An Officer Seizes A Person Outside A Vehicle

The practical and doctrinal concerns that compelled *Belton*'s holding are absent when a suspect is seized outside a vehicle. When an officer arrests a pedestrian, he does not confront the practical quandary that arises when attempting to arrest a person seated inside a car: simultaneously removing a suspect from a vehicle, searching the arrestee's person for weapons or evidence, and searching his "grabbing distance" all in a single stroke. Consequently, the concerns that prompted *Belton* to adopt a legal fiction in order to give officers a *per se* rule are extraneous to an arrest and search not involving an automobile occupant. Instead, *Chimel* controls the scope of an officer's authority to search incident to arrest.

Similarly, when an officer seizes a person *outside* a vehicle before executing an arrest, there is no longer a need for a bright-line rule that defines the arrestee's "immediate control" *inside* the vehicle. "The objective and the virtue of the *Belton* decision was to obviate uncertainty in applying the *Chimel* 'lunge area' rule to automobile searches. *Belton* simplified the task of [police] and the courts by declaring that the entire passenger compartment would be deemed within the arrestee's reach, and thus subject to search, when a vehicle occupant is arrested." *Idaho v. Foster,* 905 P.2d 1032, 1038 (Idaho Ct. App.1995). When the seizure occurs outside a car, however, the ambiguity regarding an arrestee's "grabbing distance" inside the car is gone. As the District of Columbia Circuit has recognized, "[n]o such ambiguity exists…where the police come upon the arrestees outside of an automobile. Under such circumstances, the rationale for *Belton*'s bright-line rule is absent; instead, the normal framework of *Chimel* applies." *United Stated v. Fafowora,* 865 F.2d 360, 362 (D.C. Cir.), *cert. denied,* 493 U.S. 829 (1989). *See also People v. Stehman*, 783 N.E. 2d 1, 7 (Ill.

2002) ("where police first confront the arrestee outside his vehicle, the ambiguity which *Belton* seeks to avoid no longer exists, and the rationale for its bright-line rule is absent"). Indeed, a contrary rule is inconsistent with the holding of *Vale v. Louisiana*, 399 U.S. 30 (1970). *Vale* explained that "[i]f a search of a house is to be upheld as incident to an arrest, that arrest must take place *inside* the house, not somewhere outside – whether two blocks away, twenty feet away, or on the sidewalk near the front steps." *Id.* at 33-34 (citations omitted). If police cannot justify a house search as incident to an arrest of a "recent occupant" of that house, they should not be able to justify a car search simply because the arrestee is a "recent occupant" of that car, or in "close proximity" to the vehicle.

Belton's *per se* rule is not triggered merely because the arrestee is a "recent occupant" of a vehicle. A "recent occupant" addendum to *Belton* would permit an automatic and suspicionless search of an arrestee's car and the private possessions therein without the concerns that compelled *Belton*'s holding.[5] More importantly, if *Belton* is extended to a case where police seize an individual outside of a car, it is severed from its foundation in *Chimel*. As noted, both *Chimel* and *Belton* recognized that the scope of a search incident to arrest "'must be strictly tied to and justified by the circumstances which rendered its initiation permissible.'" *Chimel*, 395 U.S. at 762; *Belton*, 453 U.S. at 457. In practice, this means that searches incident to arrest must be

[5] In previous *amicus* briefs addressing the issue *sub judice*, the United States has asserted that "the *Belton* rule is also supported by the diminished expectation of privacy that an individual has in the circumstances giving rise to its application." U.S. Br. 10, n. 3, *Arizona v. Gant*, 72 U.S.L.W. 3280 (Oct. 20, 2003), No. 02-1019; U.S. Br.11, n. 4, *Florida v. Thomas*, 532 U.S. 774 (2001) No. 00-391 (same). *Belton*, however, explained that "the justification for the search [of a container found inside a car] is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have." *Belton*, 453 U.S. at 461.

confined to "the arrestee's person and the area 'within his immediate control.'" *Chimel*, 395 U.S. at 763. If police are automatically permitted to search a recent occupant's car even though the vehicle is not "'within his immediate control,'" they are not obeying the rule announced in *Chimel*. "If there is no connection shown between a person's occupancy of a vehicle and his arrest, then extending the scope of the search incident to arrest to the vehicle is neither 'tied to' nor 'justified by' circumstances of the arrest." *Glasco v. Virginia,* 513 S.E.2d at 144 (Lacy, J., concurring). A "recent occupant" extension of *Belton* conflicts with *Chimel*'s rationale and purpose. Indeed, *Chimel* warned that a search incident to arrest provides no justification "for routinely searching any room other than that in which an arrest occurs – or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself." 395 U.S. at 763. Similarly, there is no comparable justification for automatically searching the vehicle of an arrestee who has been seized outside of his car. As the Minnesota Supreme Court aptly put it, "*Belton* does not permit searches of arrestees' vehicles; it permits searches of occupants' vehicles incident to lawful arrest." *Minnesota v. Robb,* 605 N.W. 2d 96, 101 (Minn. 2000).

II. *BELTON'S* HOLDING DOES NOT EXTEND TO ANY "RECENT OCCUPANT" OF AN AUTOMOBILE

In previous cases, the United States has argued that *Belton* makes no distinction between "occupants" and "recent occupants" of automobiles. U.S. Br at 11, *Arizona v. Gant* ("*Belton* applies as long as the arrestee is a 'recent occupant' of the vehicle"); U.S. Br at 12, *Florida v. Thomas* (same). The notion that *Belton*'s *per se* rule applies to any recent occupant of a vehicle misreads Justice Stewart's opinion. Moreover, extending *Belton* to "recent occupants," or to persons in "close proximity" to a car, will create greater

uncertainty regarding an officer's authority to search incident to arrest.

A. *Belton*'s *Per Se* Rule Applies Only When Police Seize A Person In A Car And The Person Is Subsequently Arrested

Belton's holding does not extend to any "recent occupant" of a car. As the nation's most prominent Fourth Amendment scholar has explained, "*Belton* applies only in the case of 'a lawful custodial arrest of the occupant' of the vehicle." 3 LAFAVE, *supra* § 7.1 (a) at 436 (footnotes omitted).

A judicious reading of *Belton* confirms that the Court's ruling only applies to an arrestee who was seized while an occupant of a car. First, the facts show that Roger Belton and three others were occupants of a car when their vehicle was seized for speeding. Although Belton had exited the vehicle before being placed under arrest, thus making him a "recent occupant," his status as a "recent occupant" was the direct result of the officer's authority to seize him while he was inside the car and to arrest him after detecting evidence of contraband within plain-view of the vehicle.

Next, when describing the precise issue before it, *Belton* indicates that the Court was focusing on arrestees who were occupants of automobiles – not "recent occupants" or persons in "close proximity" to cars. In the opening sentences of his opinion, Justice Stewart wrote: "When the *occupant* of an automobile is subjected to a lawful custodial arrest, does the constitutionally permissible scope of a search incident to his arrest include the passenger compartment of the automobile *in which he was riding*? That is the question at issue in the present case." 453 U.S. at 455 (emphases added).

Significantly, *Belton*'s holding is limited to situations where an arrestee was an "occupant" of a vehicle. The Court

stated: "[W]e hold that when a policeman has made a lawful custodial arrest of the *occupant* of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Id.* at 460 (footnotes omitted) (emphasis added). Finally, when applying this holding to the facts, Justice Stewart explained that the defendant's "jacket was located inside the passenger compartment of the car in which [Belton] had been a passenger just before he was arrested," thus making the jacket "'within the arrestee's immediate control'" for purposes of *Chimel*. *Id.* at 462 (footnote omitted).

In sum, although it is true that an arrestee need not be inside a vehicle at the moment the officer conducts the search, and that *Belton* itself used both the terms "occupant" and "recent occupant," *see id.* at 460, *Belton*'s analytical focus was directed toward an arrestee who was an occupant of a car when seized by the police. The lone use of the term "recent occupant" in *Belton* was an obvious reference to an arrestee who had been seized by the police while he was an occupant of an automobile and was later arrested after exiting the vehicle. *Belton* never defined or addressed who is a "recent occupant" for search incident to arrest purposes. *See Texas v. Kelly*, 963 S.W.2d 866, 869 (Tex. App – San Antonio 1998) ("the 'bright-line' test [of *Belton*] does not address who is a 'recent occupant' for purposes of being subject to a *Belton*-type vehicular search rather than a *Chimel*-type search.").

B. The Terms "Recent Occupant" And "Close Proximity" Are Inherently Ambiguous

Extending *Belton* to cover persons who have exited their vehicles prior to being seized by the police will generate greater uncertainty and ambiguity regarding an officer's authority to search a vehicle incident to arrest. For example, several lower courts have noted that if *Belton* is extended to permit a search whenever police arrest a "recent occupant"

who was not seized while inside a car, the clarity of *Belton* will be diminished. As one court explained, if *Belton* "is stretched to encompass the search of a vehicle that was voluntarily vacated by a person before confrontation with the police began, the 'bright-line' rule becomes hazy and uncertain. [Police] would be left to wonder what combination of temporal and spatial proximity the arrestee must have to the vehicle at the time contact was initiated to allow the search without a warrant." *Michigan v. Fernengel,* 549 N.W.2d 362, 363 (Mich. App. 1996). If *Belton* is applied to every "recent occupant," police will have to make case-by-case determinations regarding whether an arrestee was a "recent" occupant of a vehicle and the arrestee's proximity to the vehicle at the time of arrest. *See Texas v. Kelly,* 963 S.W.2d at 869. When applied to a motorist who was not seized while inside a vehicle, the term "recent occupant" has various connotations, and invites subjective judgments regarding a person's connection to a vehicle.

Even courts that have adopted a "recent occupant" rule recognize that case-by-case assessments are still necessary to determine an officer's authority to search incident to arrest. For example, the Colorado Supreme Court extended *Belton* to cover a situation "where the occupant of a vehicle anticipates police contact and exits the vehicle immediately before that contact occurs." *Colorado v. Savedra,* 907 P.2d 596, 599 (1995) (*en banc*). By extending *Belton* in this context, the court acknowledged that the "issue of temporal proximity between the police encounter and the defendant's presence in the vehicle is the main factor courts consider in determining whether a person is a recent occupant of a vehicle for purposes of *Belton.*" *Id.* In practice, this means that the officer in the field will first have to decide whether the arrestee has been outside of a car for a significant period of time, subject to the second-guessing of judges.

Other line-drawing problems have emerged when courts extend *Belton* to an arrestee who was not physically occupying a car when seized by the police. In *United States v. Sholola,* 124 F.3d 803 (7th Cir. 1997), the Seventh Circuit concluded that the defendant was "'positively linked'" to a vehicle when, during a conversation with an officer he had "pointed to a vehicle, opened the front driver's side door with a set of car keys in his hand, and stated, 'See, it's my car.'" *Id.* at 817. Because the defendant was "positively linked" with an automobile, the Seventh Circuit ruled that *Belton* permitted a search of the car incident to arrest, even though the arrestee was neither an occupant nor a "recent occupant" of the vehicle. Judge Wood concurred in the judgment in *Sholola,* but warned that judges should be mindful "not to extend [*Belton*] too far beyond its facts." *Id.* at 823. Judge Wood feared that the majority's use of the phrase "positively linked" might "be misunderstood in a future case." *Id.*

Sholola's interpretation of *Belton* illustrates the dangers of extending *Belton*'s holding to arrestees who have been seized outside of their vehicles. Deciding whether a person is "positively linked" or in "close proximity" to a car when he or she is seized outside the car requires considering the particular facts of each case. *See Arizona v. Dean*, 76 P.3d 429, 436 (Ariz. 2003) (recognizing that under a "close proximity" test, "the appropriate inquiry focuses on the critical factors of *when* and *where* the custodial arrest took place"). Similarly, determining whether a person is a "recent occupant" requires a particularized assessment of the facts of each case. Moreover, extending *Belton* to cover "recent occupants" eviscerates *Chimel*. Judge Wood's criticisms of the "positively linked" test are equally pertinent to a "recent occupant" standard:

> [Some] "[recent occupants]" would plainly fall outside the scope of *Belton.* For example, the police could observe a suspect parking a car in an off-street legal parking lot, and then walking two

> blocks away from it, keeping both vehicle and suspect under constant surveillance. If they then arrested the suspect, in my view they would need something other than *Belton* to justify a search of the car, even though [the defendant] might be said to [be a "recent occupant" of the car].

Sholola, 124 F. 3d at 823 (Wood J., concurring).

The United States, in previous cases, has recognized that a "recent occupant" test is not a bright-line rule. *See* U.S. Br at 29, *Arizona v. Gant* (the term "recent occupant" "may require careful line-drawing in outlying cases"). Rather than proposing a solution, in its previous *amicus* briefs, the United States has essentially urged the Court to ignore the ambiguity associated with the term "recent occupant." For example, in *Gant*, the Solicitor General asserted that there was no reason not to apply *Belton* "to the more typical case," U.S. Br at 19, where police observe a suspect "exit his car and contacted him seconds later in the vicinity of the car he had just occupied." *Id.* at 18; *see also* U.S. Br at 21, *Florida v. Thomas* ("There is no doubt that an individual is the 'recent occupant' of a vehicle when, as here, the officer sees the individual get out of the car and contacts him moments later beside the car."). Finally, the Solicitor General has stated that "[i]n determining whether *Belton* authorizes a vehicle search in outlying cases, courts should assess the reasonableness of applying the *Belton* rule in light of the basic concerns underlying the search-incident-to-arrest doctrine and the facts and circumstances of the particular arrest and search at issue." U.S. Br at 28, *Arizona v. Gant*.

In *Gant* and *Thomas*, the Solicitor General avoided the difficult question of defining when an arrestee qualifies as a "recent occupant" by arguing that the facts in those cases showed that the defendants were clearly "recent occupants" and that those fact patterns represented "the more typical case." U.S. Br at 19, *Arizona v. Gant*. We anticipate that the

Solicitor General will make a similar argument here. The Solicitor General's past claims, however, that certain fact patterns symbolize the typical scenario for *Belton* searches has not been substantiated by the records in those cases and is contradicted by some of the cases cited by the United States. *See* U.S. Br at 19, n.5, *Gant*.

Furthermore, what the Solicitor General characterizes as "outlying cases," *id.* at 28, have generated a substantial amount of litigation in the lower courts regarding the proper scope of *Belton*'s automatic search rule. *See* 3 LAFAVE, *supra*, § 7.1(a) at 436-37, n. 25 & 26 (3d ed. 1996 & Supp. 2003) (citing cases illustrating split among lower courts on *Belton*'s applicability to arrestees who were recent occupants of vehicles); *Arizona v. Dean*, 76 P.3d at 434 (noting that "state and federal courts have struggled to find a workable definition of the term ['recent occupant']"); *United States v. Green*, 324 F. 3d 375, 378-79 (5th Cir. 2003) (same). If the Solicitor General's approach is followed, the workload of this Court and the state and federal courts will not be eased. Judges will still have to decide the applicability of *Belton* to cases where an arrestee was no longer near his vehicle. The "initiates contact" test developed because many courts recognized that *Belton*'s holding should not be extended to cases where police seize a person away from of his vehicle. *See People v. Stehman*, 783 N.E. 2d at 8 ("where searches occur beyond the scope of *Belton*'s bright-line intent, the factors in *Chimel* of officer safety and evidence preservation must be present in order for a search incident to arrest to be lawful") (citations omitted). The Solicitor General's proposed solution for these cases is a vague, standardless test. If bright lines are essential to guide officers and judges, then *Belton*'s holding should be left undisturbed and this Court should reject any proposals that require police officers to assess the totality of the circumstances – which is what the Solicitor General proposes – when determining whether to proceed with a car search incident to arrest.

The court below adopted a "close proximity" rule which also requires officers and judges to weigh temporal and spatial factors to determine when a vehicle search is permissible incident to a lawful arrest. *See also Arizona v. Dean*, 76 P. 3d at 437 (acknowledging that "concepts such as 'close proximity' and 'immediately after' are of course subject to factual analysis"). The analytical flaw with a "close proximity," "positively linked" or "immediate vicinity" rule is that it allows officers and judges to interpret *Chimel*'s "immediate control" test as if it were identical to a test of "possession." This type of reasoning recalls an era of this Court's search incident to arrest jurisprudence that permitted police to search the area considered to be in the "possession" or under the "control" of the arrestee. For example, in *Harris v. United States*, 331 U.S. 145 (1947), a five-hour search of a four-room apartment was upheld as a valid search incident to arrest because the arrestee "was in exclusive possession" of the premises. *Id.* at 152. *See also United States v. Rabinowitz,* 339 U.S. 56, 63 (1950) (relying on *Harris* to uphold an hour and a half search of defendant's office as a valid search incident to arrest). The logic that supported the results in *Harris* and *Rabinowitz* was firmly rejected in *Chimel*. Even before *Chimel*, the Court had discredited a "possession" or "close proximity" test. The arrestee in *Vale* was also in "close proximity" to his home; indeed, Vale was not only a "recent occupant" of his home, he was standing on the "front steps of the house" when arrested. *Vale*, 399 U.S. at 32. But that fact provided no justification for searching his home. If Fourth Amendment principles "preclude [] indulgence in the fiction that the recesses of a man's house are like the pockets of the clothes he wears at the time of his arrest," *Harris*, 331 U.S. at 164 (Frankfurter, J., dissenting), then those same principles preclude treating a man's vehicle as the equivalent of a shopping cart pushed by the arrestee at the time of this arrest.

C. A "Recent Occupant" Rule Is Not Required By This Court's Precedents

Michigan v. Long, 463 U.S. 1032 (1983) has not, directly or indirectly, decided the issue preserved in this case. The dicta in *Long* provides no basis for extending *Belton* to "recent occupants." In *Long,* police observed Long's car traveling erratically and speeding. After watching the car swerve into a ditch, the police stopped to investigate. "As [the officers] left their vehicle and walked forward, [Long]…left from the driver's seat side" of his vehicle and met the officers at the rear of the car. *People v. Long*, 288 N.W. 2d 629, 630 (Mich. App. 1980). Suspecting that Long was intoxicated, the officers asked to see his license. As Long walked toward the open door of his car, the officers observed a large hunting knife on the floor. After frisking Long, the police conducted a search of the passenger compartment for other weapons. Inside the car they found marijuana. *Long* held that a protective search of a passenger compartment is valid when reasonable suspicion exists that a car contains weapons potentially dangerous to police.

In dicta, this Court stated "if the officers had arrested Long for speeding or for driving while intoxicated, they could have searched the passenger compartment under *New York v. Belton*." *Long*, 463 U.S. at 1035, n.1; *see also id.* at 1049, n.14 ("[T]he 'bright line' that we drew in *Belton* clearly authorizes… a search whenever officers effect a custodial arrest."). Despite this dicta, the facts in *Long* are consistent with our analysis of *Belton*'s *per se* rule being limited to cases where police seize a person while he or she is an occupant of a car. Long was inside his car when the deputies stopped to investigate. *See* 288 N.W. 2d at 630. From that moment forward, Long was seized for Fourth Amendment purposes. *See Long*, 463 U.S. at 1051 (noting that during any investigative stop, police may detain person against his will). His ability to exit his vehicle before being ordered to do so by the police did not convert the

confrontation into a non-seizure nor negate the applicability of *Belton*'s *per se* rule. *See infra* Part III.

This Court has never held that application of *Belton*'s *per se* rule should have no factual predicate other than the lawful arrest of a recent occupant, as suggested by the court below, JA 71, or implied in *Long*'s dicta. Such a holding would constitute a radical departure from the standards announced in *Chimel* and *Belton*. Although in recent years this Court has greatly enlarged the automobile exception, searches under that doctrine are never "automatic." Such searches always require probable cause that contraband is inside a car. *See Wyoming v. Houghton,* 526 U.S. 295 (1999). Similarly, searches under *Long* require reasonable suspicion that a car's passenger compartment poses a threat to an officer's safety; *Long* does not authorize an "automatic" search. *See Long*, 463 U.S. at 1049, n.14 ("We stress that our decision does not mean that the police may conduct automobile searches whenever they conduct an investigative stop."). A "recent occupant" or "close proximity" test, however, allows an automatic and suspicionless search of an automobile. This Court has never announced such a holding. Since *Chimel*, this Court's search incident to arrest precedents have embraced Justice Frankfurter's view that "[a]uthority to arrest does not dispense with the requirement of authority to search." *Harris,* 331 U.S. at 165 (Frankfurter, J., dissenting).

III. *BELTON*'S *PER SE* RULE SHOULD BE RESTRICTED TO CASES WHERE A PERSON WAS SEIZED WHILE AN OCCUPANT OF A CAR

Although the "contacts" test seeks to promote the aims of *Chimel* and *Belton*, a more workable and efficient rule is available to resolve the tension between *Belton* and *Chimel*. The *per se* rule of *Belton* should be limited to cases where a person is seized while inside a car. If police arrest a

recent occupant of a vehicle who was not seized while inside a vehicle, the scope of an officer's authority to search incident to arrest is governed by *Chimel,* not *Belton.*[6] Our *per se* rule parallels *Belton*'s holding, is easily applied by police officers, and is consistent with analogous rules that govern an officer's authority to investigate and detain occupants of automobiles. Most importantly, our proposal satisfies *Chimel*'s mandate that an officer's search power be strictly tied to the traditional rationales for the search incident to arrest exception.

First, the facts and holding of *Belton* itself establish a *per se* rule only when a person is seized while an occupant of a car. Although Belton was ordered out of the car, thus making him a "recent occupant" of the vehicle, his status as a recent occupant was the direct consequence of the officer's lawful decision to seize Belton while he was an occupant of a vehicle. Under these circumstances, *Belton* held that "when a policeman had made a lawful custodial arrest of the *occupant* of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." 453 U.S. at 460 (footnotes omitted) (emphasis added).

Second, confining *Belton*'s bright line to cases where a person was seized while inside a car produces a rule that is easily understood and followed by police officers. Well-trained officers know when they have the authority to seize an occupant of a vehicle. *See Delaware v. Prouse*, 440 U.S. 648 (1979) (random traffic stops are unconstitutional; police

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[6] The ruling below seems based on the premise that if *Belton*'s *per se* rule does not apply to "recent occupants," an officer lacks any authority to search incident to arrest. *See* JA 72-73. That analysis is wrong. The fact that *Belton*'s *per se* rule may not apply in a particular case does not preclude a search incident to arrest. *Chimel* provides the default rule in cases where *Belton* does not apply. And if *Chimel* does not authorize the challenged search, then, *ipso jure*, the search is unnecessary to promote officer safety or the preservation of evidence.

may seize a vehicle where probable cause or reasonable suspicion exists that a motorist has committed a traffic violation or other crime). Thus, whenever police detain a vehicle to investigate a traffic violation, as they did in *Belton* or *Long*, they have seized the vehicle and its occupants. If during the course of that seizure, probable cause to arrest develops, *Belton*'s *per se* rule applies regardless of whether the occupants of the vehicle remain seated in the car, have been removed from the car, or have exited the vehicle voluntarily.

Although petitioner had not been signaled for a traffic stop, JA 16, the court below, like a few other lower courts, thought *Belton* was applicable to remove the concern that officers might have to "race" to a suspect's vehicle to prevent the suspect from exiting from his or her car. JA 73; *see also, Nebraska v. Gonzalez*, 487 N.W.2d 567, 572 (Neb. App.1992) ("In order to conduct a valid search, police officers should not have to race from their vehicles to the arrestee's vehicle to prevent the arrestee from getting out of his or her vehicle."); *cf. Colorado v. Savedra,* 907 P.2d at 600 ("if *Belton* were read to preclude a search…where police contact occurred just after the suspect exited the vehicle, then knowledgeable suspects could effectively conceal evidence by stepping outside of their vehicle whenever they saw a police officer approaching"). Confining *Belton*, however, to cases where police seize a car occupant eliminates the concern that officers will have to "race" from their patrol cars to prevent an occupant from exiting his car. If police pull over or detain a vehicle while the suspect is inside, as they did in *Gonzalez*, 487 N.W.2d at 568, a suspect cannot "*Belton*-proof" the car by exiting the vehicle before the officer can vacate his cruiser. A "seizure" occurs "the moment [a motorist] was pulled over by" an officer. *Ohio v. Retherford*, 639 N.E. 2d 498, 506 (Ohio App. 1994); *cf. California v. Hodari D.*, 499 U.S. 621, 626 (1991) (explaining an "arrest requires *either* physical force… *or*,

where that is absent, *submission* to the assertion of authority"). Thus, even a suspect who voluntarily exits his vehicle during a traffic stop is still considered "seized" for Fourth Amendment purposes until the traffic stop is completed. *See New York v. Class*, 475 U.S. 108, 116 (1986) (noting that officers could effect the seizure of a motorist who voluntarily exited his car until "they completed their investigation"). Further, under our proposal, an officer will not have to inquire why a motorist exited his vehicle. Where a person is lawfully seized inside his vehicle and arrested, *Belton* applies regardless of why an arrestee exits his or her car.

Third, limiting *Belton* to cases where a person was seized while an occupant of a car produces a rule that is consistent with analogous Fourth Amendment rules governing an officer's power to investigate and detain occupants of automobiles. For example, *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (*per curiam*), held that during a traffic stop police may routinely order a driver out of his vehicle. *See also Maryland v. Wilson*, 519 U.S. 408, 415 (1997) (extending *Mimms*' holding to passengers). In reaching this conclusion, however, *Mimms* emphasized that it was not holding "that whenever an officer has an occasion to speak with the driver of a vehicle, he may also order the driver out of the car." *Mimms*, 434 U.S. at 111, n.6 (internal quotation marks omitted). *Mimms* and *Wilson* restrict forcible exit orders of car occupants to lawful seizures. A contrary rule would subject anyone in a car to an arbitrary intrusion. Likewise, if police have no basis for seizing an automobile occupant, that person's decision to exit his vehicle should not occasion an automatic search of his vehicle merely because the person is later arrested outside the vehicle. *Compare, Vale*, *supra* (a search of a home cannot be upheld as a valid search incident to arrest even if the arrest occurs on the front steps of the house).

The concern about undercover surveillance operations, expressed below, JA 72-73, provides no justification for extending *Belton*'s *per se* rule to scenarios that do not implicate the traditional rationales for the search incident to arrest exception. To be sure, an undercover officer might hesitate to confront a suspect while engaged in surveillance procedures. But an undercover officer's interest in maintaining his "cover" does not justify an automatic and suspicionless search of a vehicle if a suspect is later arrested outside his vehicle. For Fourth Amendment purposes, the undercover officer's situation is indistinguishable from the patrol officer who has a hunch, but not probable cause, that a suspect's vehicle might contain contraband or a weapon. A desire to search has never been the touchstone for constitutional reasonableness. As noted by one member of the Court the during oral argument in *Florida v. Thomas*, an officer's desire to search a vehicle "doesn't equate with the necessity to do so to protect himself or to protect any evidence that someone might grab during an arrest process that occurs as the person has distanced himself from the car." Tr. Oral Arg. *Florida v. Thomas*, No.00-391 at 33.

Finally, our proposal avoids the line-drawing problems inherent in the ruling below that has officers deciding whether an arrestee was in "close proximity, both temporally and spatially," JA 74, to a vehicle for search incident to arrest purposes. Officers and judges should only decide whether a person was seized while an occupant of a car. When police seize a person in a car, and the person is subsequently arrested, *Belton*'s *per se* search rule applies.

Under our proposal, the search of petitioner's vehicle was unreasonable because petitioner was not seized while an occupant of that vehicle.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals for the Fourth Circuit should be reversed.

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In The Supreme Court of the United States

MARCUS THORNTON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR THE STATES OF ARIZONA, ALABAMA, DELAWARE, FLORIDA, HAWAII, ILLINOIS, INDIANA, KANSAS, MARYLAND, MICHIGAN, MISSOURI, MONTANA, NORTH DAKOTA, OKLAHOMA, OREGON, SOUTH CAROLINA, TEXAS, UTAH, VERMONT, VIRGINIA, AND WYOMING AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICI STATES

Thornton's case presents an issue of considerable importance to the undersigned States, whose vehicle search procedures incident to an occupant's arrest reflect this Court's interpretation of the Fourth Amendment. To ensure officer safety and prevent the destruction of evidence when arresting a vehicle's occupant, law enforcement officers regularly search the vehicle incident to arrest under *New York v. Belton*, 453 U.S. 454 (1981). These interests, along with the safety of the public, would be compromised if this Court adopted Thornton's proposed rule. His rule requires officers to (1) warn the suspect of their presence before he exits the vehicle and (2) formally arrest him while he is within "reaching distance" of the vehicle, even if he flees.

The proposed rule is unworkable and dangerous. Thus, the States have a strong interest in having this Court uphold the decision of the United States Court of Appeals for the Fourth Circuit, which held that Thornton's close spatial and temporal proximity to his vehicle at the time of his arrest, without more, justified searching his vehicle under *Belton*. *United States v. Thornton*, 325 F.3d 189, 196 (4th Cir.), *cert. granted*, 124 S. Ct. 453 (2003).

STATEMENT OF THE CASE

A uniformed police officer in an unmarked vehicle began to follow Thornton's car, intending to stop the car due to a discrepancy between its license plate and make and model. JA 9-10, 31, 62. But before the officer "had a chance" to initiate a stop, Thornton pulled into a parking lot and got out of the car. *Id.* The officer immediately

pulled in behind him and approached him on foot, asking for his driver's license and telling him that his tags did not match the registered vehicle. *Id.* As a result of a consensual pat-down and Thornton's voluntary relinquishment of the cocaine and marijuana that he carried in his pockets, the officer immediately arrested him. After securing Thornton in the police vehicle, the officer searched his car and found a pistol under the driver's seat. *Id.* at 11, 32, 63.

The trial court denied Thornton's pretrial motion to suppress the gun, finding that the vehicle search was legal on two independent grounds: as a search incident to Thornton's arrest and as an inventory search prior to towing. *Id.* at 27. The United States Court of Appeals for the Fourth Circuit affirmed the vehicle search as incident to arrest under *Belton* and found it unnecessary to address the inventory search issue. JA 74-75 (325 F.3d at 196). The court rejected as dangerous and unworkable Thornton's theory that a *Belton* search cannot be undertaken unless the police initiate contact with the suspect before he exits his vehicle. JA 72 (325 F.3d at 195). The court instead ruled that Thornton's recent occupancy of the vehicle and his physical proximity to it at the time of his arrest justified the search:

> The conceded close proximity, both temporally and spatially, of Thornton and his car at the time of his arrest provides adequate assurance that application of the *Belton* rule to cases like this one does not render that rule limitless. Accordingly, we hold that Officer Nichols lawfully searched Thornton's automobile incident to the arrest.

JA 72 (325 F.3d at 196).

SUMMARY OF THE ARGUMENT

In *New York v. Belton*, the defendant was arrested after exiting his vehicle. This Court upheld a search of the vehicle's passenger compartment, stating that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." 453 U.S. at 460. This Court grounded its holding on the historic rationales underlying the search-incident-to-arrest doctrine – officer safety and preservation of evidence – and declared that in this "category of cases," the potential dangers to police officers and evidence are presumed to exist in every instance. *Id.*

The Court of Appeals for the Fourth Circuit correctly upheld the search of Thornton's car under *Belton*. Thornton's proposed "contact-initiation" rule – that *Belton* does not apply to a recent occupant of a car unless the arrestee exited the car *after* police contact – places an arbitrary limit on *Belton* that is entirely divorced from, and at war with, *Belton*'s rationales. A recent occupant of a vehicle can just as easily grab a weapon or evidence from the interior of a car whether or not he exited the vehicle after police contact. Indeed, the proposed initial-contact rule would compromise police security and surveillance by forcing or encouraging officers to clearly announce their presence to a suspect and/or to rapidly approach a suspect's vehicle, even when doing so is contrary to sound law enforcement practice. An initial-contact rule would also demand a subjective and unworkable inquiry into an arrestee's motive for exiting a vehicle and would foster greater uncertainty in an area where predictability is of paramount importance.

Rather, as the court of appeals correctly reasoned, *Belton* applies whenever a vehicle's passenger compartment is – arguably and generally – "within the area into which an arrestee might reach in order to grab a weapon or evidentiary item." Nothing about securing an arrestee in a nearby police vehicle – a common and routine police procedure used in Thornton's case – removes an arrestee from *Belton*'s scope. The factors that justified the search in *Belton* are equally applicable here: the peculiar dangers of vehicle stops and arrests, the threat that arrestees – or nearby confederates or onlookers – pose in such situations, the need for a bright-line rule applicable to everyday arrest scenarios, and the lesser privacy interests associated with automobiles.

ARGUMENT

The Court of Appeals Correctly Rejected Thornton's Proposed "Contact-Initiation" Rule in Favor of the Recent-Occupancy Test That *Belton* Embodies.

The court of appeals correctly rejected Thornton's proposed "contact-initiation" rule. *Belton* does not require the police to warn a suspect of their presence before arresting him, regardless whether he is in or out of his vehicle at the time of the arrest. Instead, a suspect's recent occupancy of the vehicle at the time of arrest, without more, justifies a *Belton* search. As the court of appeals pointed out:

> [T]he limitation on the *Belton* rule that Thornton urges could encourage individuals to avoid lawful searches of their vehicles by rapidly exiting or moving away from the vehicle as officers

> approached. Surely, police officers should not have to race from their vehicle to the arrestee's vehicle to prevent the arrestee from getting out of the vehicle in order to conduct a valid search.

JA 73 (325 F.3d at 196) (citations, internal quotation marks, and brackets omitted).

The court of appeals correctly refused to add an arbitrary and dangerous "notice" requirement to the straightforward *Belton* rule. Whether the police have warned or attempted to warn the suspect of their presence before arresting him inside or outside the vehicle is irrelevant. Nothing justifies making a suspect's actual or constructive awareness of the police a factor in implementing *Belton*.

Thornton contends that subjectivity – the suspect's state of mind before exiting his vehicle – plays no role in a contact-initiation analysis. Pet. Br. at 29 & n.6. He asserts that whether a person exits a vehicle voluntarily or in response to a police contact is "irrelevant" in that it "does not introduce a subjective component into the [contact-initiation] rule." *Id.* According to Thornton, all that matters is that the police attempt to make contact before the suspect gets out of the automobile – a "purely factual," nonsubjective test. *Id.*

Thornton's assertion is illogical. What legitimate purpose could a warning requirement serve other than to make the suspect aware of the police? Surely, if the police must "signal confrontation," they must do so in good faith, i.e., in a nonperfunctory manner intended to get the suspect's attention and convey to him that the signaled "confrontation" is a police contact. Why impose a warning

requirement if its ostensible purpose is, as Thornton concedes, "irrelevant"?

Even in cases where an officer's actions might fail to achieve actual (subjective) awareness in the suspect but would objectively satisfy Thornton's attempt-to-warn requirement, the suspect's actual awareness of the police would be "irrelevant" only because his *constructive* awareness would supplant it. In other words, if an officer's actions constitute a bona fide attempt to effect a warning, then the suspect necessarily becomes *constructively* aware of an impending encounter with the police. Otherwise, a warning requirement is meaningless, lacking any legitimate purpose. Thus, inevitably, the suspect's state of mind before exiting the vehicle is a component of Thornton's rule, regardless whether the evidence of a pre-exit "contact" supports actual or constructive awareness of the police.

The proposed contact-initiation rule contravenes *Belton*'s purposes by requiring police to "signal confrontation" before an individual alights. The requirement is arbitrary because it rests on a false distinction among occupants based on their subjective or constructive states of mind. It is dangerous because signaling confrontation will increase the risk, particularly in cases like Thornton's, where the suspect is aware of his criminal status and has a weapon in the automobile. Conducting the arrest outside the automobile achieves the same safety objectives regardless whether the police have attempted to warn the occupant that he is about to encounter a police officer.

The court of appeals properly rejected Thornton's proposed rule. The criteria that trigger *Belton*'s implementation are purely objective: when the arrest

occurs in close proximity to the individual's occupancy of the vehicle, the police may contemporaneously search the passenger compartment incident to the arrest. Because Thornton was a recent occupant within the meaning of *Belton* when he was arrested and the search was contemporaneous with that arrest, the search was valid.

A. Belton Forged a Unique Rule for Automobile Searches Incident to Arrest By Extending *Chimel v. California*'s "Immediate Area of Control" Concept to Encompass a Vehicle's Passenger Compartment.

In *Belton*, a police officer stopped a car for speeding, and while Belton and the other three occupants were still in the car, he developed probable cause to arrest them for possession of marijuana. 453 U.S. at 455-56. He ordered them out of the car, arrested them, and secured them in "four separate areas of the Thruway." *Id.* at 456. He searched each of them and then returned to the automobile and searched its passenger compartment, finding cocaine in Belton's jacket. *Id.*

This Court upheld the vehicle search, holding that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Id.* at 460. Although the Court used the term "occupant" in stating its holding, the Court's statement of the facts made clear that Belton was outside the vehicle when he was arrested. *Id.* at 454. The Court's statement of the issue alluded to recent occupancy, *id.* at 460, and the opinion acknowledged that Belton "*had been* a passenger just before he was arrested," *id.* at 462 (emphasis added). In other words, the Court recognized

that at the time of Belton's arrest, he was no longer an occupant of the vehicle but a recent occupant.

1. *Belton* created a bright-line rule under which arrest rather than pre-exit police contact authorizes the search.

The starting point for the Court's analysis in *Belton* was the principle that "a lawful custodial arrest creates a situation which justifies the contemporaneous search without a warrant of the person arrested and of the immediately surrounding area." *Id.* at 457 (citing *Chimel v. California*, 395 U.S. 752, 763 (1969)). In *Chimel*, the Court held that an officer who arrests a person in his home may search incident to the arrest the area within the person's "immediate control," that is, the area within which the person could reach a weapon or destructible evidence. 395 U.S. at 763. In *Belton*, the Court noted that lower courts had found no workable definition of the area within the arrestee's immediate control "when that area arguably includes the interior of an automobile and the arrestee is its recent occupant." 453 U.S. at 460. The Court also noted that many courts had struggled with the recurring question "whether, in the course of a search incident to the lawful custodial arrest of the occupants of an automobile, police may search inside the automobile *after the arrestees are no longer in it.*" *Id.* at 459 (emphasis added). Recognizing that *Chimel* had "established that a search incident to an arrest may not stray beyond the area within the immed ate control of the arrestee," *id.* at 460, the Court set out to "determine the meaning of *Chimel*'s principles in this particular and problematic [context]," *id.* at 460 n.3 (emphasis added).

This Court grounded *Belton* on the historic rationales underlying the search-incident-to-arrest doctrine: officer safety and preservation of evidence. *Id.* at 457-59; *see also Knowles v. Iowa*, 525 U.S. 113, 116-17 (1998); *United States v. Edwards,* 415 U.S. 800, 802-03 (1974); *Chimel,* 395 U.S. at 762-63; *Preston v. United States,* 376 U.S. 364, 367 (1964); *Agnello v. United States,* 269 U.S. 20, 30 (1925). The need to disarm suspects and protect evidence makes it reasonable for police officers to search the person of the arrestee and the area within which he might obtain a weapon or evidentiary items. *Chimel*, 395 U.S. at 766, 768; *cf. Terry v. Ohio*, 392 U.S. 1, 19 (1968) (warrantless search must be justified by the circumstances permitting its initiation).

The Court observed in *Belton* that when "[an] arrestee is [a car's] recent occupant," the passenger compartment is "generally, even if not inevitably, within the area into which [the] arrestee might reach in order to grab a weapon or evidentiary ite[m]." 453 U.S. at 460 (citation and internal quotation marks omitted). Recognizing and adopting that generalization enabled the Court to "establish the workable rule [that] this category of cases requires." *Id.* The Court's express recognition in *Belton* that automobile searches incident to arrest comprise a category of their own finds support throughout the Court's Fourth Amendment jurisprudence, which has recognized that persons have a lesser expectation of privacy in automobiles. *See, e.g., Wyoming v. Houghton*, 526 U.S. 295, 303 (1999) (car searches intrude much less upon personal privacy and dignity than searches of persons because of the everyday exposure of automobiles and their contents to public view, police regulation, and potential involvement in traffic accidents); *California v. Carney*, 471 U.S. 386,

390-92 (1985) ("ready mobility" and pervasive regulation result in a reduced expectation of privacy in motor vehicles); *Almeida-Sanchez v. United States*, 413 U.S. 266, 279 (1973) (Powell, J., concurring) (car searches are "far less intrusive on the rights protected by the Fourth Amendment than the search of one's person or of a building"). The reduced expectation of privacy in an automobile is "diminished further when the occupants are placed under custodial arrest." *Robbins v. California*, 453 U.S. 420, 431 (1981) (Powell, J., concurring), *overruled by United States v. Ross*, 456 U.S. 798 (1982).

Viewing custodial arrests of recent occupants of automobiles as a special "category of cases," this Court specifically rejected case-by-case examination of the reasons supporting a search incident to arrest, deciding instead that the recent occupant's lawful arrest, without more, justifies the search. *Belton*, 453 U.S. at 459-60 (citing *United States v. Robinson,* 414 U.S. 218, 235 (1973)). In *Robinson*, the Court stated:

> The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. . . . [A] search incident to the arrest requires no additional justification. . . .
>
> . . . Since it is the fact of custodial arrest which gives rise to the authority to search, it is of no moment that [the officer] did not indicate any subjective fear of the [defendant] or that he did not himself suspect that [the defendant] was armed.

414 U.S. at 235-36; *see also Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001) ("[W]e have traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review.").

Under *Belton*, the dangers to police officers and the need to preserve evidence in the vehicle are *presumed* to exist when officers are arresting the recent occupants of automobiles. 453 U.S. at 461; *Bailey v. State*, 12 P.3d 173, 177 (Wyo. 2000); *cf. Knowles*, 525 U.S. at 116-17 (while the "legitimate and weighty" concerns for officer safety and the need to preserve evidence justify a search of the vehicle in the case of a custodial arrest, they are insufficient to presumptively justify a search of the vehicle during a routine traffic stop when the occupant merely receives a citation).[1] Thus, the arrest itself is the triggering mechanism of a vehicle search incident to a recent occupant's arrest, not the police officer's initiation or

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[1] *Knowles* established that *Belton* does not apply when the occupant is cited but not arrested. In *Belton*, the Court presumed that concerns for officer safety and the need to preserve evidence are present in every custodial arrest, obviating case-by-case analysis. 453 U.S. at 461; *Bailey*, 12 P.3d at 177. In *Knowles*, the Court determined that those concerns are either absent altogether or present to a lesser extent when an occupant is merely cited. 525 U.S. at 118-19. Thus, only a custodial arrest triggers a *Belton* search, and a citation is not the functional equivalent of an arrest. *Knowles* did not modify the *Belton* rule, but simply declined to apply it to situations other than custodial arrests. *Bailey*, 12 P.3d at 177; *Polke v. State*, 528 S.E.2d 537, 540 (Ga. App. 2000). It is therefore consistent with the States' argument that arrest alone triggers a *Belton* search.

attempted initiation of contact before the individual alights from the vehicle or the existence of any actual danger in a particular case. *See Robinson*, 414 U.S. at 235 ("It is the fact of the lawful arrest which establishes the authority to search. . . . "). The likelihood that an arrestee will lunge for a weapon in a vehicle that he recently occupied does not vary according to the circumstances under which he exited the vehicle. As this Court has emphasized, "[t]he danger to the police officer *flows from the fact of the arrest*, and its attendant proximity, stress, and uncertainty." *Id.* at 234 n.5 (emphasis added); *see also Washington v. Chrisman*, 455 U.S. 1, 7 (1982) ("Every arrest must be presumed to present a risk of danger to the arresting officer."). Thus, regardless *why* an individual gets out of his car, "the 'bright line' that [the Court] drew in *Belton* clearly authorizes [a search of the car's passenger compartment] *whenever* officers effect a custodial arrest." *Michigan v. Long*, 463 U.S. 1032, 1049 n.14 (1983) (emphasis added).

2. *Belton*'s bright-line rule minimizes the risks inherent in arresting recent occupants of automobiles.

Belton's bright-line rule permits police officers to arrest a recent occupant outside the vehicle and to secure him away from it before conducting the search. This avoids the greater potential dangers involved in attempting, in the name of *Chimel*, to conduct the arrest and the search while the occupant is in the automobile, which in many instances the police would technically be able to do. *See State v. Wanzek*, 598 N.W.2d 811, 815 (N.D. 1999) ("Police officers should not have to race from their vehicles to the arrestee's vehicle to prevent the arrestee from

getting out of the vehicle in order to conduct a valid search."); *State v. Gonzalez*, 487 N.W.2d 567, 572 (Neb. App. 1992) (same).

Belton's requirement that the search be contemporaneous with the recent occupant's arrest, 453 U.S. at 460, does not preclude law enforcement officers from exercising their judgment to reduce the risks associated with the arrest. *See, e.g., United States v. Doward*, 41 F.3d 789 (1st Cir. 1994). In *Doward*, the arrestee's daughter, herself subject to an outstanding arrest warrant, unexpectedly emerged from the gathering crowd and attempted to intervene during a *Belton* search after the arrestee had been secured in a patrol car. 41 F.3d at 791-93 & n.5. In upholding the search, the federal appellate court noted that the potential for such unpredictable developments "vindicate[s] the *Belton* rationale" and rejected a limitation on *Belton* that would "immerse the courts in second-guessing security decisions made by law enforcement officers in rapidly evolving circumstances." *Id.* at 793 & n.5.

No procedure eliminates the danger inherent in an arrest. Even arrestees secured in a patrol car, as Thornton was, can escape and threaten officers or destroy evidence. *See, e.g., Plakas v. Drinski*, 19 F.3d 1143, 1144-45 (7th Cir. 1994) (suspect handcuffed in back seat of squad car escaped from squad car and later confronted police); *United States v. Sanders*, 994 F.2d 200, 210 & n.60 (5th Cir. 1993) (citing incidents in which handcuffed arrestees killed police officers). But this Court wisely forged a rule in *Belton* that minimizes those dangers, thereby ensuring a much higher degree of safety in arrests effected in close proximity to automobiles. Conducting the arrest outside the automobile achieves the same safety objectives

whether or not the occupant exits in response to a police contact.

B. The "Contact-Initiation" Rule That Thornton Proposes Is Untenable Because It Threatens Rather Than Fosters Public Safety and Frustrates *Belton*'s Purpose – to Provide a Safe, Bright-Line Standard Procedure for Police to Follow.

1. The "contact-initiation" rule is arbitrary and dangerous.

In arguing that *Belton* applies only where the police signal, warn, or otherwise confront the occupant before he exits the vehicle, Thornton proffers an arbitrary and dangerous limitation that contravenes *Belton*'s reasoning and its safety-oriented purposes. His proposed rule blurs the bright-line recent-occupancy test beyond any predictable, consistent applicability and dramatically increases the dangers inherent in arrests involving occupants of automobiles. The proposed rule poses an arbitrary and dangerous dilemma for law enforcement officers: they must decide, in the heat of the moment, whether to somehow "signal confrontation" while the occupant is still in the vehicle or to forego a *Belton* search in the event that the occupant alights "unsignaled" or "unconfronted."

This warning requirement fosters gamesmanship. It arbitrarily limits *Belton*, accomplishing nothing beyond giving drivers and passengers a head start to engage in dangerous conduct such as stepping on the accelerator, grabbing a firearm, or destroying evidence. *See Cardwell v. Lewis*, 417 U.S. 583, 590 (1974) ("[W]here the automobile's owner is alerted to police intentions . . . , the

motivation to remove evidence from official grasp is heightened."). In declining to impose Thornton's proposed, pre-exit confrontation rule, the court of appeals observed that it would be unwise to force police officers to choose between preserving evidence and protecting themselves and others from potential violence:

> [W]hen encountering a dangerous suspect, it may often be much safer for officers to wait until the suspect has exited a vehicle before signaling their presence, thereby depriving the suspect of any weapons he may have in his vehicle, the protective cover of the vehicle, and the possibility of using the vehicle itself as either a weapon or a means of flight. Mandating that officers alert a suspect to their presence before he sheds the protective confines of his vehicle would force officers to choose between forfeiting the opportunity to preserve evidence for later use at trial and increasing the risk to their own lives and the lives of others. We decline to require officers to make this choice.

JA 72-73 (325 F.3d at 195).

Not every occupant will respond violently to "signaled confrontation" or engage in a dangerous attempt to flee upon becoming aware of the police, but many will. Police officers in the field cannot be expected to foresee which occupants are so inclined. Every citizen is presumed to know what conduct the criminal laws proscribe. *See Atkins v. Parker*, 472 U.S. 115, 130 (1985) ("All citizens are presumptively charged with knowledge of the law."). Thus, an occupant who has committed a criminal offense – Thornton had marijuana and cocaine in his pockets and an illegal gun under his seat in the car – presumably knows that he is subject to arrest at any time. Under such

circumstances, where the individual may well be primed to flee or violently resist arrest, an obligatory warning signal is not only superfluous but dangerous.[2]

A "contact-before-exit" requirement is also a purely arbitrary limitation because it assumes a false distinction between occupants who are aware of the police and those who are not. Any person subject to arrest while in a car is potentially dangerous, precisely because he presumably knows his status. In Thornton's case, the officer suspected before Thornton alighted that he might be subject to arrest for driving a stolen vehicle, but in many instances the police will not have such information until after the occupant is out of the vehicle. Precipitation or heavily tinted windows, for example, could conceal ongoing illegal activity or a wanted person's identity until he steps out of the vehicle. In terms of public safety, officer safety, and evidence preservation, there is no difference between a driver or passenger whom the police "stop," "contact," "signal," or otherwise challenge while he is still in the vehicle and one whom the police do not "stop," "contact," "signal," or otherwise challenge until after he gets out of the vehicle – except that "signaling confrontation" may well escalate the risks. For example, a person bent on

[2] Again, although Thornton insists that a suspect's actual (subjective) awareness of the police before exiting his vehicle is "irrelevant," Pet. Br. at 29 & n.6, a pre-exit warning requirement has no legitimate purpose other than to make the suspect aware of the police. A mandatory attempt to make contact is likely to succeed if implemented in good faith, thus increasing the risk and preventing police officers from exercising discretion in deciding whether to announce their presence before the suspect exits the vehicle. Therefore, this Court should not discount the subjectivity inherent in Thornton's proposed rule.

evading arrest is more likely to emerge brandishing a weapon when forewarned of police officers' presence. Thornton had a handgun in his car. His proposed pre-exit warning rule does nothing but increase the potential danger to everyone concerned.

This Court should defer to police officers' training and discretion in determining how to conduct an arrest – either by "signaling confrontation" while the individual is in the car or by avoiding doing so until after the person gets out, depending on the circumstances. *See State v. McLendon*, 490 So. 2d 1308, 1309 (Fla. App. 1986) (*Belton* search upheld where undercover officer did not announce his presence until it was safe to arrest murder suspect inside a building, twenty to thirty feet from the door of the suspect's car). To hold otherwise would only foster gamesmanship – ensuring that the occupant has a head start on evasive action.

A police officer cannot know exactly when, why, or at what rate of speed an occupant will exit a vehicle. Consequently, if Thornton's proposed rule were adopted, officers who for whatever reason had not "signaled confrontation" might make an otherwise unnecessary, aggressive advance upon a moving or stationary vehicle to prevent its occupants from becoming "pedestrians." *See Wanzek*, 598 N.W.2d at 815; *Gonzalez,* 487 N.W.2d at 572. A pre-exit confrontation rule accomplishes nothing but escalated risk.

The legality of a vehicle search incident to a recent occupant's valid arrest should not turn on whether the individual was actually or constructively aware of the police before he exited the vehicle. Thornton's approach creates the very problems for police and courts that *Belton*

sought to avoid. Any "awareness of the police" test is antithetical to undercover police work. The whole idea of undercover law enforcement activity – particularly arrests by undercover officers – is to avoid announcing police presence before apprehending the offender. It would not be in the public's interest to force undercover officers to elect whether to announce their identity prematurely in compliance with Thornton's pre-exit confrontation rule or to forego a *Belton* search by remaining incognito until they can physically detain the person after he exits the vehicle.

2. Thornton's proposed rule will foment confusion among officers in the field and invite endless suppression-hearing litigation on subjective minutiae that would be irrelevant under an objective recent-occupancy test.

Even where police officers are in uniform, a rule requiring case-by-case determinations whether the police accomplished a pre-exit "confrontation" is certain to spawn confusion among law enforcement personnel, generate unwarranted minitrials on subjective factual minutiae, and result in additional inconsistent legal rulings nationwide. Trial courts will be burdened with minitrials on arrestees' and police officers' motivations and their actions in furtherance thereof in virtually every instance in which the government relies on *Belton*. Along with the inevitable inconsistent results, the proposed initial-contact rule will cause substantial additional expenditures of time and resources due to the circumstantial nature of state-of-mind evidence.

This case exemplifies the unworkability and subjective nature of an initial-contact rule. The officer who arrested Thornton testified that he thought that Thornton

was aware from the outset that he was a police officer because although he was driving an unmarked car, he was in uniform and Thornton appeared to be driving evasively, avoiding pulling alongside his car. JA 9-10. The officer pulled in behind Thornton's car as soon as Thornton stopped in the parking lot. Did immediately pulling in and stopping behind Thornton's car, combined with Thornton's apparent ongoing awareness that the person following him was a policeman, amount to an "initial contact" before Thornton alighted, even though the officer had not overtly "signaled confrontation"? If making the suspect aware of a policeman's presence before he alights is the ostensible purpose of the proposed confrontation requirement, could reasonable jurists find that the requisite actual or constructive awareness had been achieved in Thornton's case? Some might say yes and some no, as a finding of fact, while others might rule based on sheer formalism: no overt warning, no compliance. In cases like Thornton's, where flashing lights and sirens are not employed, inconsistent results would be inevitable.

Thornton's proposed rule invites defendants to perjure themselves at suppression hearings by denying any actual pre-exit awareness of the police, thereby requiring the State to establish constructive awareness. No rule or standard of review should be based upon a criminal defendant's after-the-fact averments about his mental processes. *See State v. Medrano*, 914 P.2d 225, 227 (Ariz. 1996) (murder defendant's self-serving testimony about his mental state at the time of the offense was "subject to skepticism"). A rule based on a person's actual or constructive awareness of the police invites litigation concerning an individual defendant's physical or mental condition, including expensive expert testimony on those matters.

Disputes will arise concerning vision, hearing, and mental acuity, as well as external influences on perception such as intoxication, weather conditions, lighting, ambient noise, and the physical characteristics of the arrestee's vehicle – facts that are irrelevant under a recent-occupancy analysis.

Disputes will also arise as to whether certain actions by the police were intended to constitute "contact" or "confrontation." But police officers' subjective intentions rarely factor into Fourth Amendment analyses. *See Ohio v. Robinette,* 519 U.S. 33, 38 (1996) (objective circumstances of traffic stop allow officer to order driver out of car, "subjective thoughts notwithstanding"); *Whren v. United States*, 517 U.S. 806, 811-13 (1996) (stating that this Court is "unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers"); *Robinson,* 414 U.S. at 236 & n.7 (availability of "search incident to arrest" for officer safety does not depend on the officer's subjective mind set); *see also Scott v. United States,* 436 U.S. 128, 138 (1978) ("[T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.").

Police should not be required to memorialize what they intended or attempted to do to get an occupant's attention while the individual was in the car. Nor should officers be required to divine an individual's motivation for exiting the vehicle. When multiple officers are involved, they may not agree on the arrestee's motivation. Further, when a vehicle contains multiple occupants, each individual could assert a different reason for exiting the vehicle,

complicating the situation for the police and the courts. Moreover, a rule based on the occupant's actual or constructive state of mind invites dissimulation – pretending to exit the vehicle "voluntarily" although aware of the police.

Instead, officers should focus on the timing and location of the arrest in relation to the arrestee's occupancy of the automobile. Otherwise, the validity of many searches will remain anybody's guess until long after the fact – when trial courts undertake to sort out arrestees' and police officers' motivations and beliefs and to determine, where contested, the precise timing of any "confrontation" warnings vis-a-vis the occupants' exits from their vehicles.

Under Thornton's contact-before-exit rule, nearly limitless nuances would frustrate the police and the courts. For example, with respect to the pre-exit component, would an individual be deemed "in" or "out" if he has one foot in the vehicle and one on the ground at the instant of initial police contact? Would that depend on whether some part of his body was still touching the seat? What if he has both feet on the ground but the door is open and he is leaning into the passenger compartment – or just reaching in? What if the door is closed but he is leaning or reaching in the window? Would an arm or hand be enough, or would courts require that all or part of the torso be inside the car? What if the person is sitting on the tailgate of a station wagon or sport utility vehicle but his feet are touching the ground – could he merely stand up to render *Belton* inapplicable? What if the person is standing outside the vehicle but has left the engine running?

Moreover, what would constitute pre-exit contact? Could it be nonverbal, such as a signal by hand, whistle, or flashlight? Or, because the contact-before-exit rule necessarily depends on the suspect's precise physical location at the time of initial contact, would the initial contact have to reflect the officer's present ability to make immediate physical contact? How would an undercover officer readily accomplish a pre-exit confrontation within the meaning of Thornton's proposed rule?

The second prong of Thornton's proposed test – a "reaching distance" restriction – similarly portends additional unwarranted nuances of proof. Pet. Br. at 32-33. Under Thornton's test, would an arrestee's "reaching distance" depend on the length of his arms and legs, his age, and his physical condition? Might a defendant arrested in inclement weather argue that the terrain was so slippery that he could not have lunged toward the car at all? Moreover, Thornton's "reaching distance" concept, like his proposed contact-before-exit rule, encourages flight rather than cooperation with the police. Thornton's rule would give even an unwarned recent occupant who sensed an officer's approach an incentive to distance himself from the automobile and from the officer as quickly as possible. The Court should not interpret *Belton* to encourage such maneuvers. Instead, the Court should apply the standard already embodied in *Belton*, which focuses on the recency of the suspect's occupancy of the vehicle at the time of arrest. Otherwise, given the endless variations in the facts that Fourth Amendment issues inevitably engender, many suppression hearings on *Belton* searches would become extended minitrials on factual minutiae, and police officers' actions would have no predictable legal consequences.

Thornton misconstrues *Belton* by interpreting it to require evidence that the police attempted to "signal confrontation" while the suspect was in the car or that the suspect was aware of the police before he got out. Instead of the individual's actual or constructive awareness of the police before exiting the vehicle or his arrest within a fixed distance from the automobile, it is the mere fact that the individual was arrested while he was a recent occupant of the vehicle that justifies a *Belton* search. Thornton's undeniable recent occupancy is dispositive under *Belton*, justifying the search incident to his arrest. For all the foregoing reasons, this Court should reject Thornton's distortion of the *Belton* rule and uphold the court of appeals' decision.

C. The Only Workable Standard for This Category of Cases Is That the Arrestee's Recent Occupancy of the Vehicle at the Time of Arrest Triggers a *Belton* Search, Without Regard to the Arrestee's State of Mind.

1. This Court intended to articulate a simple, workable standard in *Belton*.

In *Belton*, this Court intended to articulate "a single, familiar standard" that police officers can quickly and consistently apply to the circumstances that confront them: "[W]hen a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." 453 U.S. at 460. In announcing that test, the Court stressed that Fourth Amendment rules "'ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are

necessarily engaged'" and should not turn upon "'[a] highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions.'" *Id.* at 458 (quoting Wayne R. LaFave, *"Case-By-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma*, 1974 S. Ct. Rev. 127, 141-42). The Court therefore sought to articulate a "straightforward rule, easily applied, and predictably enforced." *Belton*, 453 U.S. at 459.

As this Court later observed, citing *Belton*, implementing Fourth Amendment protections in daily law enforcement activity requires clear, simple, and readily administrable rules:

> Often enough, the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made. Courts attempting to strike a reasonable Fourth Amendment balance thus credit the government's side with an essential interest in readily administrable rules.

Atwater, 532 U.S. at 347. A workable standard is essential:

> [T]he protection of the Fourth and Fourteenth Amendments can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement.

Belton, 453 U.S. at 458 (internal quotation marks omitted). This Court established such a standard in *Belton* and should reject Thornton's attempt to supplant it with an arbitrary, unworkable one.

2. The only viable test is whether the arrest occurred while the individual was a recent occupant of the vehicle.

The only viable test for determining whether *Belton* applies in a particular case is whether the individual was arrested while he was a recent occupant of the vehicle, i.e., in close spatio-temporal proximity to his occupancy of the vehicle. Applying that test in *Belton*, this Court determined that Belton's recent occupancy of the vehicle justified the search incident to his arrest:

> [Belton's] jacket was located inside the passenger compartment of the car in which [Belton] *had been* a passenger *just before* he was arrested. The jacket was *thus* within the area which we have concluded was "within the arrestee's immediate control" within the meaning of the *Chimel* case.

453 U.S. at 462 (emphasis added); *see also Long*, 463 U.S. at 1035 n.1, 1049 n.14 (stating that where an occupant exited the vehicle shortly before the initial police contact, the officers could have searched the car under *Belton* if they had arrested him: "*Belton* clearly authorizes [an automobile] search whenever officers effect a custodial arrest").

Whether an arrestee is a recent occupant of the vehicle at the time of his arrest is a factual inference to be drawn from the circumstances at hand. *See United States v. Cortez*, 449 U.S. 411, 421-22 (1981) (police officers' professional experience is part of "the whole picture"

supporting an inference of possible criminal activity); *Henry v. United States*, 361 U.S. 98, 102 (1959) ("Probable cause [to effect a warrantless arrest] exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed."). Such a determination of recent occupancy, based on the totality of the circumstances, is neither novel nor difficult. The "totality of the circumstances" concept is a familiar standard that officers in the field can apply in making the recent-occupancy determination. Police officers are trained to assess probable cause to arrest by considering whether the totality of the circumstances supports a reasonable inference that an individual is engaged in criminal activity. They can easily employ an analogous test when deciding whether to search an arrestee's vehicle under *Belton*.

To determine whether an arrestee is a vehicle's recent occupant within the meaning of *Belton*, officers need only reasonably decide based on their training, experience, and the totality of the circumstances whether the arrest occurred in close spatio-temporal proximity to the arrestee's occupancy of the vehicle. The objective material factors will include, for example, the physical distance between the vehicle and the site of arrest, the time that elapsed between the occupant's exit from the vehicle and his arrest, and any statements that he or other witnesses have made concerning his occupancy of the vehicle. In the uncommon instances where more than minimal time and distance are involved, another factor may be whether the individual created additional delay or distance from the vehicle by attempting to flee. *See United States v. Arango*, 879 F.2d 1501, 1505-07 (7th Cir. 1989) (*Belton* search upheld where defendant, who had fled from the area of the vehicle, was quickly apprehended approximately one block

away); *but see State v. Dean*, 76 P.3d 429, 437 (Ariz. 2003) (suspect who ran from his vehicle knowing police were following him and held them at bay for two hours in a house was not a "recent occupant" for *Belton* purposes).

Thornton's case, for example, is a run-of-the-mill *Belton* situation. Like Belton, Thornton cannot seriously contest his recent occupancy of the vehicle at the time of arrest. The court of appeals found that the time and distance between Thornton's exit from the vehicle and his arrest were de minimis. JA 74 (325 F.3d at 196) (although the record was "not clear as to the precise distance between [the defendant] and his automobile when [the officer] confronted him, the record ... conclusively show[ed] that [the officer saw the defendant] park and exit his automobile and then approached [him] *within moments*") (emphasis in original). Further, because Thornton's state of mind and what the police officer did or did not do to get his attention in the car are irrelevant and because concerns for officer safety remain even when an arrestee is secured away from the car, nothing meaningfully distinguishes Thornton's case from Belton's. *See Plakas*, 19 F.3d at 1145 (suspect handcuffed in back seat of squad car escaped and confronted police); *Sanders*, 994 F.2d at 210 & n.60 (citing incidents in which handcuffed arrestees killed police officers). Thornton's car was properly searched as a contemporaneous incident to his arrest because he was a recent occupant of the car when he was arrested.

Other cases may present more difficult facts. *See, e.g.*, *McLendon*, 490 So. 2d at 1309 (undercover officer waited to announce his presence until it was safe to arrest murder suspect inside a building, twenty to thirty feet from

the suspect's car). But the Fourth Amendment's reasonableness requirement will ensure, just as it does in other categories of search and seizure cases, that the police and the courts implement *Belton* in a manner consistent with *Chimel*'s caution that there must be a "rational limitation" on the scope of searches incident to arrest. *Chimel*, 395 U.S. at 766-67; *see* JA 74 (325 F.3d at 196) ("The conceded close proximity, both temporally and spatially, of [the defendant] and his car at the time of his arrest provides adequate assurance that application of the *Belton* rule to cases like this one does not render that rule limitless.").

Admittedly, this Court cannot announce precise boundaries for the recent-occupancy standard, but that does not impair the standard's utility or reasonableness. "No one case . . . is a proper vehicle for identifying the limits of [an] exception." *Oregon v. Kennedy*, 456 U.S. 667, 690 (1982) (Stevens, J., concurring). The value of an overarching standard "lies in [its] capacity for informed application under widely different circumstances without injury to defendants or to the public interest." *Wade v. Hunter*, 336 U.S. 684, 691 (1949). Reasonableness and common sense will establish and preserve rational limitations. *See South Dakota v. Opperman*, 428 U.S. 364, 375 (1976) ("'[W]hether a search and seizure is unreasonable within the meaning of the Fourth Amendment depends upon the facts and circumstances of each case.'" (quoting *Cooper v. California*, 386 U.S. 58, 59 (1967))).

The Court established an objective bright-line rule in *Belton* that can and should be applied in a simple and straightforward fashion, regardless of the suspect's actual or constructive state of mind before getting out of the car. The arrest itself triggers a vehicle search incident to a

recent occupant's arrest, not that the police initiated or attempted to initiate contact before the individual alighted from the vehicle. Applying the *Belton* rule differently would destroy its purposes.

CONCLUSION

For these reasons, the amici States respectfully request that the Court apply the objective recent-occupancy rule it applied in *Belton*, hold that it controls in Thornton's case, and affirm the court of appeals' decision.

Respectfully submitted,

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